2006

Frito-Lay and/or Transcontinental Insurance Company v. Utah Labor Commission and Amy C. Clausing : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FRITO-LAY and/or TRANS-CONTINENTAL INSURANCE COMPANY,	:	
Appellant/Petitioner,	:	
vs.	:	Case No. 20061053 - CA
UTAH LABOR COMMISSION and AMY C. CLAUSING,	:	Labor Commission No. 2003892
	:	Priority 7
Appellees/Respondents.		

BRIEF OF APPELLEE
AMY C. CLAUSING (EMPLOYEE)

Appeal from Order of Judge Session's Findings of Fact, Conclusions of Law, and Order of September 23, 2005 and the Order Dismissing Respondent's Rule 60(b) Motion Entered by the Appeals Board of the Utah Labor Commission on October 23, 2006

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PRELIMINARY STATEMENT REGARDING
RULE 24, UTAH RULES OF APPELLATE PROCEDURE

The Utah Supreme Court has endeavored on numerous occasions to emphasize to counsel the importance of professionalism and civility in the practice of law and has adopted Rule 24 (k), Ut. R. Civ. P. which provides that "[a]ll briefs under this rule must be . . . free from burdensome, irrelevant, immaterial or scandalous matters." As that Court recently noted[1], the term "scandalous" includes statements which are defamatory and offensive to propriety.

As the Court will note, in numerous locations throughout Employer's Brief, such scandalous statements are most inappropriately directed at Employee and, more particularly, at Employee's counsel, K. Dawn Atkin. The most offensive of those statements involve

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[1]Peters v. Pine Meadow Ranch Home Association, 2007 UT 2, 4 (Utah. Jan. 12, 2007)

Employer's personal attacks against Ms. Atkin asserting that she violated Rule 3.1 of the Rules of Professional Conduct because:

> She knows that her interpretation of the Order , if followed, would make the Order contrary to the evidence and the law. She is knowingly misusing ambiguous language, and thereby, abusing legal procedure.[2]

The record does not support those scandalous accusations. They are false and were made with either actual knowledge, or with reckless disregard, of that falsity. Either way, such statements set forth in Employer's Brief constitute a serious violation of the provisions of Rule 24, Utah Rules of Appellate Procedure, and should be appropriately addressed by this Court.

JURISDICTION

As reflected in Employer's Docketing Statement, the Judgment or Order appealed from is the Order of the Commission dated October 24, 2006. That Order of the Commission dismissed Employer's Rule 60(b) Motion and struck the March 17, 2006 decision of Judge Sessions in which he decided the merits of that Motion against Employer. As that Order reflects, it neither addressed nor affected the Findings of Fact, Conclusions of Law and Order of Judge Sessions dated September 23, 2005, as to which the Employer had not filed any timely Request for Review, and which had become final on October 24, 2005.

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[2]Employer's Brief, p. 16

This Court has jurisdiction over the appeal from the October 23, 2006[3] Order of the Appeals Board of the Labor Commission, pursuant to Utah Code Anno. §34A-2-801 (8) (2003). §63-46b-16 (1998), and §78-2a-3 (2) (a).

With respect, however, this Court does not have jurisdiction to determine whether Judge Sessions' abused his discretion in denying the Rule 60(b) Motion. That issue must be addressed in the first instance by the Labor Commission. In the event the Court determines the Commission committed reversible error in determining that Rule 60(b) had no application to this proceeding and that such error was prejudicial to the Employer, the Court should appropriately remand the matter to the Commission for its review and determination of whether Judge Sessions abused his discretion in denying the Employer's Rule 60(b) Motion.

Neither does this Court have jurisdiction over any purported appeal from the Findings of Fact, Conclusions of Law and Order of Judge Sessions dated September 23, 2005, as to which the Employer failed to file a timely Request for Review, a statutory prerequisite to judicial review.[4]

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[3]Order Dismissing Respondents' Rule 60(b) Motion, R. 460

[4]*Utah Code Anno.* §34A-2-801 (8)(c) ["A party claiming to be aggrieved may seek judicial review only if the party has exhausted the parties remedies before the commission as provided by this section."]

ISSUES PRESENTED FOR REVIEW

As previously reflected in the Employee's Motion for Summary Disposition, the sole issue on this appeal is whether the Appeals Board of the Utah Labor Commission committed reversible error in its Order dated October 23, 2006, which dismissed Employer's Motion pursuant to Rule 60 (b), *Ut. R. Civ. P.*, declaring that Rule was not cognizable in this workers' compensation proceeding. The remaining "Issues" outlined in Petitioner's Brief[5] are not properly before this Court.

STANDARD OF REVIEW

The standard of review varies in this matter, depending upon which of the various issues set forth in Employer's Brief is being considered. Matters of statutory construction are questions of law that are generally reviewed for correctness."[6] However, when reviewing the Commission's interpretation of its own rules, the Court applies "an intermediate standard of review, deferring to an agency's interpretation as long as it is both reasonable and rational."[7]

The standard of review for mixed questions of law and fact has been summarized as follows:

> In this case, the Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it. See Utah Code Ann. §34A-1-301 (1997) . . . As such, we must uphold the

[5]Employer's Brief, p. 1

[6]*Esquivel v. Labor Comm'n,* 2000 UT 66, 7 P. 3d 777 (Utah, 2000).

[7]*Barnard & Burk Group, Inc. v. Labor Commission*, 2005 UT App. 401, 122 P. 3d 700, 703 (Utah App., 2005).

> Commission's determination . . . unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion under 63-46b-16(h)(i) of the UAPA. . . . Moreover, we resolve, "'[a]ny doubt respecting the right of compensation in favor of the injured employee.'" *Drake v. Industrial Comm'n*, 939 P. 2d 177, 182 (Utah, 1997)(citation omitted).[8]

There do not appear to have been any reviews of a denial of a Rule 60(b) Motion from the Labor Commission. However, this Court has previously recognized that such a denial by a trial court will be reversed only when an "abuse of discretion" has been established.[9] That the same standard should be applicable to an appeal from the denial of a Rule 60(b) determination made by the Labor Commission.

DETERMINATIVE STATUTES

Utah Code Anno. §34A-2-801 (2006) provides the basic statutory requirement for timely filing of Motions for Review. It provides, in pertinent part:

> (2) Unless a party in interest appeals the decision of an administrative law judge in accordance with Subsection (3), the decision of an administrative law judge on an application for hearing filed under Subsection (1) is a final order of the commission 30 days after the date the decision is issued. The commission, the commissioner, an administrative law judge, or the appeals Board, is not bound by the usual common law or statutory rules of evidence, or by any technical or statutory rules of evidence, or by any technical or formal rules or procedure, other than as provided in this section or as adopted by the commission * * *
>
> (3) (a) A party in interest may appeal the decision of an administrative law judge by filing a motion for review with the Division of Adjudication within 30 days of the date the decision is issued.

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[8] *AE Clevite v. Labor Comm'n*, 996 P. 2d 1072, 1074 (Utah App., 2000), *cert. den.* 4 P. 3d 1289 (Utah, 2000).

[9] *Jensen v. Foote*, 2005 UT App. 156, ¶ 20 (Utah App., 2005); *Franklin Covey Client Sales, Inc. v. Melvin*, 393 Ut. Adv. Rep. 23, 2000 UT App. 110, ¶ 9 (Utah App., 2000)

(8) (c) A party claiming to be aggrieved may seek judicial review only if the party has exhausted the party's remedies before the commission as provided by this section.

Similarly *Administrative Rule* R602-2-1(M) provides for review of Orders by Administrative Law Judges and specifies that such review must be requested within thirty days in accordance with the Motion for Review provisions of *Utah Code Anno.* §§63-46b-12 and 34A-1-303 (1997).

Utah Code Anno., §34A-1-304 (1) (a) (1997) provides that the Commission "shall make rules governing administrative procedures." Subsection (b) further specifies, "the rules made under this section are not required to conform to common law or statutory rules of evidence or other technical rules of procedure." In accordance with those provisions, *Administrative Rule* R602-2-1, as adopted by the Labor Commission, provides for only limited incorporation of the *Ut. R. Civ. P.* It does not adopt Rule 60(b).[10]

Rule 60 (b), *Ut. R. Civ. P.* provides, in pertinent part:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . . A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation.

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[10]R602-2-1 (F)(4) [Depositions pursuant to Ut. R. Civ. P.; R602-2-1(F)(9) [sanctions under Rule 37]; R602-2-1 (G) [Subpoenas served as provided in Ut. R. Civ. P.; and R602-2-1 (N) ["generally follow the Utah Rules of Civil Procedure regarding discovery and the issuance of Subpoenas"].

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

Administrative Law Judge, Dale W. Sessions, entered Amended Findings of Fact, Conclusions of Law, and Order to Correct Benefit Computation Omission on September 23, 2005. In that Order, Judge Sessions determined Employee had met the burdens of both legal and medical cause, that she was injured while working for Employer on March 18, 1999, and that she did not reach medical stability until June 10, 2004. The Order further declared that Employee was, therefore, entitled to workers compensation benefits related to her injury. In addition to entering an award for the medical expenses and permanent partial disability benefits, the Order of Judge Sessions incorporated the medical panel report and Stipulation of the parties by reference and Ordered, in pertinent part:

> 9. Petitioner is awarded temporary total disability compensation from March 18, 1999 to June 10, 2004. The applicable computation rate is $487.00 per week; and
>
> 14. Respondent is permitted an offset for amounts previously paid by Respondent(s) in all areas of this award.[11]

That Order embodied a significant judicial error in that it awarded the maximum temporary total disability benefits at the rate of $487.00 per week for the entire period from the date of injury on March 18, 1999 through the date she reached medical stability on June 10, 2004.[12] While Employee was entitled to disability benefits for that entire period, those

[11]Amended Finding of Facts, Conclusions of Law and Order to Correct Benefit Computation Omission of Judge Sessions dated September 23, 2005, R. 151 - 153

[12]Utah Code Anno. §34A-2-410 (1999) [(1)(a) In case of temporary disability, so long as the disability is total, the employee shall receive 66 2/3% of that employee's average

benefits should have been divided between temporary total disability while she was off work, based upon the full $487.00 per week maximum, and temporary partial disability taking into consideration those weeks, and the earnings she received, while engaged in light duty work.[13] Since that outcome was contemplated by the parties, those periods of light duty work, and the amounts earned, were fully set forth in paragraph 12 of the Stipulation of the parties,[14] which was incorporated in that Order.

Paragraph 12 set forth each of the various dates during which Employee had been able to perform light duty work, together with the various weekly amounts she was able to earn during those periods. That paragraph concluded by noting that the Stipulation was entered into on September 15, 2004 and that "Temporary total or temporary partial disability thereafter will need to be addressed at a later date."[15]

After Judge Sessions issued his Order on September 23, 2005, Employer failed to timely file a Motion for Review to appeal that Order. Employer also failed to pay the benefits awarded to Employee under the terms of that Order, or any part of those benefits.

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weekly wages at the time of the injury but: (i) not more than a maximum of 100% of the state average weekly wage at the time of the injury per week."]

[13]Utah Code Anno. §34A-2-411 (1999) ["(1) If the injury causes temporary partial disability for work, the employee shall receive weekly compensation equal to: (a) 66 2/3% of the difference between the employee's average weekly wages before the accident and the weekly wages the employee is able to earn after the accident, but not more than 100% of the state average weekly wage at the time of the injury (plus $5.00 for each of her two dependent children)]

[14]Stipulation of Facts and Proposed Medical Panel Questions, R. 105 at 109

[15]*Id.*

On December 20, 2005, Employee finally requested the Commission to issue an Abstract of the Award in order to enforce the award against Employer.[16]

On December 21, 2005, Employer filed a "Rule 60(b) Motion for Relief from Judgment,"[17] asking Judge Sessions to set aside his award. Judge Sessions considered Employer's allegations, together with the factual background of the case and Employer's actions. On March 17, 2006, Judge Sessions entered his Order denying Employer's Rule 60(b) Motion.[18] That Order found that Employer's assertions were "not indicative of mistake, inadvertence or excusable neglect"[19] and that, "It would be unjust to set the amended order aside under the facts of this case."[20]

Employer then filed a Motion for Review with the Appeals Board of the Labor Commission to review Judge Sessions Order denying Employer's Rule 60(b) Relief.[21]

On October 23, 2006, the Appeals Board issued its Order Dismissing Respondent's Rule 60(b) Motion[22] and this Appeal followed.

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[16]R. 155

[17]R. 163

[18]Amended Order Denying Rule 60(b) Motion Filed by Respondent and Denying Reconsideration of the Order, R. 334

[19]*Id.* at 335

[20]*Id.*

[21]R. 338

[22]*Supra*, note 3

STATEMENT OF FACTS

In its Brief, Employer has failed to set forth various portions of the facts which are relevant and material to this action, but which fail to support its assertions. Employer has set forth other asserted facts based upon its own interpretations of those facts rather than the facts themselves. Employee has, therefore, addressed its Statement of Facts to reflect the relevant and material facts of this case, as reflected by the record.

1. The underlying Order of Judge Sessions[23] awarded Employee temporary total disability benefits for the entire period from the date of her work related injury on March 18, 1999, through the date she reached medical stability on June 10, 2004, at the rate of $487.00 per week[24], which is a total of $126.814.34 (after deduction of the $6,136.60 previously paid). When combined with the applicable interest at 8% per annum from the dates those payments were due through December 15, 2005 of $56,747.51, that brought the total amount of the award to $183,561.85.[25]

2. That Order embodied a significant judicial error in that failed to apply appropriate adjustments to the temporary disability award for the various times between March 18, 1999 to June 10, 2004, when Employee was earning a lesser income performing light duty work,

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[23] *Supra,* note 11

[24] *Id., Supra,* note 3

[25] Computations accompanying letter from K. Dawn Atkin to Mr. Kanell dated December 1, 2005, R. 214. See also computations accompanying proposed Abstract of Award and computations forwarded to Judge Sessions dated December 20, 2005, R. 155

in accordance with paragraph 12 of the Stipulation which was incorporated into that Order.[26]

3. As reflected in that Stipulation, Employee was not able to earn the $900.00 per week she was previously earning during that period from March 18, 1999 to June 10, 2004.[27] However, she was able to work in a light duty capacity during various times, and with various earnings, during that period. Paragraph 12 of the Stipulation specified:

> "Petitioner continued to work for Frito-lay in a light duty capacity from 3/18/99 to 5/17/99 earning $400.00 per week. However, she was unable to perform her duties with Frito-Lay and the employment ended. Thereafter, petitioner continued to work in a light duty capacity as follows:
>
> 5/8/99 petitioner started working for Orbit earning $11.48/hr:
> 5/8/99 to 12/29/99 restricted to 20hrs/wk. Earned $228/wk
> 12/30/99 to 1/10/00 (1st knee surgery) Unable to work.
> 1/11/00 to 2/28/00 40 hrs/week. Earned $456.00/wk
> 2/29/00 to 4/30/00 restricted to 20 hrs/wk. Earned $228/wk.
> 5/1/00 to 5/20/00 40 hrs/week $456.00 wk
> 5/21/00 to 5/30/00 (1st elbow surgery) Unable to work.
> 5/31/00 to 6/21/00 40 hrs/week $456.00/wk
> 6/22/00 to 6/28/00 (2nd elbow surgery) Unable to work.
> 6/29/00 to 8/16/00 40 hrs/week $456.00/wk
> 8/17/00 to 9/11/00 (2nd knee surgery) Unable to work.
> 9/12/00 to 10/2/00 restricted to 20 hrs/wk. Earned $228/wk
> 10/3/00 to 4/4/02 40 hours/week $456.00/wk
> 4/5/02 to 4/18/02 (3rd knee surgery - hardware removal) Unable to work.
> 4/19/02 to 5/30/02 restricted to 20 hrs/wk. Earned $228/wk
> 5/31/02 to 10/19/02 40 hrs/week $456.00 wk
> 10/20/02 changed jobs to ISG earning $12.48/hr
> 10/20/02 to 5/5/03 40 hrs/week $499.20/wk
> 5/5/03 Laid off from ISG
> 5/5/03 to 3/1/04 no work
> 3/1/04 Began working at Pacific Rim earning $12.00/hr
> 1/04 (sic) to 6/25/04 40 hrs/week $480/wk
> 5/25/04 (sic) laid off from Pacific Rim"

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[26] *Supra*, note 14 at ¶12

[27] *Id.*, at ¶3

Paragraph 12 of that Stipulation went on to specify, "The parties created this stipulation on September 15, 2004. Temporary total or temporary partial disability thereafter will need to be addressed at a later date."

4. Employee submitted her pre-hearing disclosures[28] prior to that Stipulation. In it, she specified that Employee was seeking, among other benefits, temporary total disability, temporary partial disability, and further permanent partial disability benefits. Employee also stated, at paragraph 9 (c): "We believe that the full payment of TTD and TPD was not paid after the various knee surgeries. However, there does not seem to be any dispute regarding the dates and we hope to have this issue resolved before the hearing."[29]

5. The parties were able to resolve the dispute regarding those dates prior to the scheduled hearing, as reflected at paragraph 12 of their Stipulation, as previously referenced.

6. In accordance with the Stipulation, the matter was subsequently submitted to a Medical Panel. The Medical Panel Report was returned and properly forwarded to all parties on August 19, 2005. In that Report, the Panel responded to the ALJ's questions, in pertinent part, as follows:

> (1) Is there a medically demonstrable causal connection between the petitioner's current medical condition and the alleged incident which occurred on or about 21 May, 2000?
>
> A. With regard to the right knee, it appears that the aggravation from the above accident is legitimate and the petitioner is stable at this time, albeit it is anticipated she will have recurrent episodes and may require further treatment.

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[28]R. 375

[29]*Id.*

B. The low back condition appears to be ongoing and appears to be a permanent aggravation of a pre-existing condition from the industrial accident of 18 March, 1999. * * *

(2) When did the petitioner's Condition stabilize as a result of the incident on or about 21 May, 2000?

We feel that the petitioner stabilized when Dr. Morgan indicated on 10 June 2004 that he had nothing else to offer and her condition had not changed.[30]

7. Employer filed an Objection to that Medical Panel Report,[31] but failed to file it within the time period required. Counsel for Employee properly submitted a written Response to that Objection.[32] Judge Sessions thereafter rejected Employer's Objection as untimely, rendering it unnecessary for him to consider Employee's Response.[33]

8. Although Judge Sessions did not consider Employee's Response, it was, nevertheless, forwarded to Employer's Counsel, as reflected in that Response,[34] prior to the Judge's rejection of Employer's Objection. In that Response, Employee explained:

Finally, I must admit to being confused by respondents claim of a stipulated stabilization date. The current Stipulation of Facts and Proposed Medical Panel Questions includes a complete outline of petitioner's income from 1999 to 2004 so that Temporary Partial Disability could be calculated if petitioner was found not to be at MMI. (Stipulation of Fact and Proposed Medical Panel Questions, pg. 5.) Stabilization was a primary issue in this case as reflected in the parties stipulated proposed question #3. If the fusion

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[30]R. 113, at 116

[31]R. 120

[32]R. 144

[33]*Supra*, note 11

[34]*Supra*, note 32, at 145

surgery is not reasonable, has petitioner reached MMI? I do not understand why respondents would now argue that we stipulated to a January 14. 2002 MMI date.

We respectfully request that the Medical Panel Report be admitted into evidence.

It appears that TTD and TPD have not been paid correctly throughout this claim. (Compare TTD paid, Stipulation page 3, with the income chart, Stipulation pg. 5) Therefore, we request an order for Temporary Total Disability/Temporary Partial Disability through MMI of June 10, 2004, less amounts actually paid, plus 8% interest. I would be happy to prepare a chart of these benefits if it would be helpful.[35]

9. In accordance with the provisions of Utah Code Anno. §34A-2-410 (2) (2006):

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

However, §34A-2-411 (1999) reduces that obligation of the Employer when the injury causes only partial disability for work, prior to medical stability, in which event the employee's disability compensation is reduced to equal:

"(a) 66-2/3% of the difference between the employee's average weekly wages before the accident and the weekly wages the employee is able to earn after the accident, but not more than 100% of the state average weekly wage at the time of the injury; plus $5.00 . . . for each dependent child . . ."

10. Judge Session's Order should have reflected an appropriate adjustment in the award of temporary disability benefits for those various periods of time between March 18, 1999 through June 10, 2004, as reflected in that Stipulation of the parties, during which Employee was working on a light duty basis for her Employer or others. If the required

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[35] *Id.*

adjustments had been made, the award would have been significantly less. As reflected in Employee's letter of December 1, 2005 and the attached computations, if those required adjustments had been made, the Award would have only amounted to $92,956.46 (after deducting the $6,136.66 previously paid by Employer). When combined with the applicable interest at 8% per annum from the dates those payments were due through December 15, 2005 of $30,104.76, that brought the total amount of the award to $123,061.20.[36]

11. Employer failed to timely file any Motion for Review or Motion for Reconsideration before the Order became final.

12. Beginning on November 4, 2005, Employee's attorney placed several calls to one of Frito-Lay's attorneys and left messages requesting payment of Employee's disability compensation. Frito-Lay's attorney did not return those calls.[37]

13. On December 1, 2005, Employee's attorney got through to another of Frito-Lay's attorneys. In that telephone conversation, Employee's attorney pointed out that Judge Sessions' decision awarded a larger sum of disability compensation than was warranted under the parties' stipulated facts. Employee's attorney advised that, notwithstanding Judge Sessions' award, Employee would accept the lesser amount of disability compensation consistent with the stipulated facts.[38]

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[36] *Supra*, note 25

[37] *Supra*, note 3, at 461

[38] *Id.*

14. In a letter dated December 6, 2005, Frito-Lay's attorney rejected that offer, based on the attorney's own evaluation of Employee's claim and without reference to the terms of Judge Session's decision.[39]

15. After rejecting Employee's demand for payment, Frito-Lay took no action to challenge Judge Sessions' decision, nor did Frito-Lay pay the compensation awarded to her by that decision.[40]

16. On December 20, 2005, Employee asked Judge Sessions to issue an abstract of judgment so she could force Frito-Lay to pay the compensation.[41]

17. On December 21, 2005, Employer filed a document entitled "Rule 60(b) Motion for Relief from Judgment" asking Judge Sessions to set aside his award of temporary total disability compensation and to conduct an evidentiary hearing on that issue.[42]

18. On March 17, 2006, Judge Sessions denied Employer's Motion on the grounds that Frito-Lay had not satisfied the standards set forth in Rule 60(b) *Ut. R. Civ. P.* for granting such a request.[43] More specifically, in that Order, Judge Sessions found and determined:

> Respondent filed his motion 90 days after the entry of the final order. However, Respondent has failed to make his case out for the relief requested

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

in that insufficient grounds for mistake, surprise or excusable neglect exists. Respondent failed to return telephone calls to Petitioner's counsel and grossly neglected to request relief from the order by way of appeal within the 30 days allowed by law and rule for such relief if he in fact was confused by the amended order itself.

Given the history of the attempts to communicate between counsel after the order issued, and the fact that Respondent waited too long to file an appeal, it would be unjust for the order to be set aside at this time. If Respondent was truly confused, his efforts should have focused on clearing that confusion by way of motion for review within the appropriate period instead of trying to rescue the delay by this method. In addition, Respondent advances the Affidavit of Andrew Wadsworth which demonstrates that Respondent intended to dispute the claimed amount, but only announced that to Counsel for Petitioner on December 1, 2005, a period still beyond the appeal period. Then some 20 days later Respondent filed the current motion. This is not indicative of mistake, inadvertence or excusable neglect. It would be unjust to set the amended order aside under the facts of this case. * * *

Because no appeal was taken, and because the motion for relief from judgment was filed without sufficient grounds made out as required in Rule 60, Utah Rules of Civil Procedure, as outlined above, the Rule 60(b) Motion for Relief from Judgment must be denied.[44]

As reflected above, Judge Session's Order was not limited to a determination, as claimed by Employer, that, "he had no authority to correct the misinterpretation or mistake."[45]

19. Employer did file a Motion for Review with the Appeals Board of the Labor Commission for review of Judge Session's Order denying that Motion. The Appeals Board dismissed the Rule 60(b) Motion, finding:

In summary, the Appeals Board concludes that adjudication of Ms. Clausing's workers' compensation claim is governed by the provisions of UAPA, the Labor Commission Act, and the Utah Workers' Compensation Act. These statutes do not authorize Frito-Lay's attempt to use Rule 60 (b), U.R.C.P., as

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[44] *Supra*, note 18

[45] Employer's Brief, Statement of Facts No. 16

a method to obtain relief from Judge Sessions' decision of September 23, 2005. Because Frito-Lay's purported Rule 60(b) motion was not cognizable in this workers' compensation proceeding, Judge Sessions' decision addressing the merits of the Rule 60 (b) motion is a nullity.[46]

20. In a previous proceeding between the parties, Case No. 2001163, Administrative Law Judge, Sharon Eblen,did enter an Order dated October 22, 2002, as attached as Exhibit "F" to Employer's Brief. That Order found Employer liable for the industrial knee and low back injury, as well as the subsequent May 21, 2000 fall, and ordered payment of certain undisputed but unpaid permanent partial disability compensation. That Order did not address the issue of temporary disability benefits in any manner nor did it indicate, as Employer states in its Brief, that, "No Temporary Total Disability was awarded, inasmuch as Clausing was working at the time, and all time where she had not worked up to that date, October 22, 2002, had already been paid."[47]

21. Employee's Application for the present hearing specifically sought, among other benefits, temporary partial disability benefits, together with temporary total disability benefits for the various periods when she was wholly unable to work due to treatment for surgeries prior to reaching medical stability.[48]

22. There is no factual basis for Employer's claim of any "intentional misinterpretation" of Judge Session's Order by Employee's Counsel. Rather, the language of the Order was sufficiently clear and unambiguous for the Appeals Board to interpret the

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[46]*Supra*, note 3

[47]Employer's Brief, p. 4.

[48]R. 1

Order in precisely the same manner as Employee and her counsel. As stated by the appeals Board in the Order from which Employer now appeals:

> The decision awarded temporary total disability compensation to Ms. Clausing for the entire period between her work accident and the date she reached medical stability, with no reduction for her work and earnings during that period.[49]

SUMMARY OF THE ARGUMENT

POINT I. The Commission did not err in determining that the applicable statutes did not authorize Employer's use of its Rule 60 (b) Motion to obtain relief from Judge Sessions' Order of September 23, 2005.

A. Neither the applicable statutes nor the Commission's administrative rules provide for the use of a 60(b) Motion in workers' compensation proceedings.

The Utah Supreme Court has held that administrative proceedings are not subject to the *Ut. R. Civ. P.* unless the governing statute or regulations so provide. Neither UAPA, the Labor Commission Act, nor the Worker's Compensation Act, provide that Rule 60(b) applies to workers' compensation proceedings. The administrative rules adopted by the Commission provide that certain provisions of the Rules are applicable to such proceedings, but Rule 60(b) is noticeably absent.

B. The Commission's decision is not contrary to any public policy requirement that Rule 60(b) relief be applied to its proceedings.

The Utah Supreme Court has previously rejected the assertion that there is an "implied public policy" requiring that Rule 60(b) be applied to worker's compensation proceedings, opting instead for the "more pertinent public policy" that the Commission may prescribe its own procedural rules and the statutory requirements specifying time periods within which

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[49] *Supra*. note 3

appeals must be sought. This Court is not the appropriate venue for seeking such statutory, or administrative rule. changes.

C. The Commission's decision is not contrary to the statutory provisions providing for motions for reconsideration.

Motions for reconsideration are regularly considered by the Commission. However, they are also subject to statutory time limits and Employer did not timely undertake the appropriate actions for seeking a Motion for Reconsideration in this matter.

D. The Commission's decision is not contrary to the "continuing jurisdiction" provisions of the Workers' Compensation Act.

The "continuing jurisdiction" of the Commission is not without limits. Other than for correction of mere "clerical errors," the Commission has authority to modify a prior, "final" award only if there has been some intervening significant change in circumstances which would justify that modification. There was no such significant change in circumstances in this case.

POINT II. Employer failed to properly marshal the evidence.

An appellant may not select only portions of the material facts to set forth on appeal. Rather, an Appellant must basically act as a "devil's advocate," presenting in comprehensive and fastidious order every scrap of competent evidence introduced with regard to the case, which supports the findings which it now resists. Rather than marshaling all of the evidence in support of the Order, Employer has referenced only those facts it deems helpful to its appeal. In view of Employer's failure to marshal the evidence, the Court may properly assume that the evidence supports the Order.

POINT III. Employer, even in a trial court setting, would not be permitted to use its Rule 60(b) motion as a substitute for a timely appeal.

Both this Court and our Supreme Court have previously declared that Rule 60(b) Motions may not be based upon Judicial errors of the Court. Otherwise, as those Courts have noted, Rule 60(b) would improperly become a substitute for timely appeals. The underlying Findings of Fact, Conclusions of Law and Order of Judge Sessions, which was the subject of the Rule 60(b) Motion, was a final Order of the Commission months before Employer filed its Rule 60(b) Motion. That Motion asserts that Judge Sessions made a judicial error in awarding temporary total disability benefits at the full rate for the entire period from the date of Employee's injury until she reached medical stability. If Employer wished to appeal that Order, Employer was required to timely file a Motion for Review within 30 days of the date of the Order, which Employer failed to do. Employer may not now use Rule 60(b) as a substitute for its failure to file a timely Motion for Review.

POINT IV. The facts of this case fail to demonstrate any "Mistake, inadvertence, or excusable neglect" which, even in a trial court setting, would justify relief pursuant to Employer's 60(b) Motion.

Although the Findings of Fact, Conclusions of Law and Order of Judge Sessions in the present case was in error, it was not "ambiguous." The Order clearly set forth the period of the award of temporary total disability and the weekly amount awarded for that entire period. The pleadings and other documents of record reflected that Employee was seeking temporary disability benefits for the entire period for which Judge Sessions subsequently entered his Order. Judge Sessions Order awarded the benefits for that entire period but failed

to make appropriate adjustments to that award for the periods during which Employee was able to earn some for light duty work, as the parties had set forth in their prior Stipulation. Employer chose to ignore the language of the Order and to contest its liability based on the attorney's own evaluation of Employee's claim, without reference to the terms of Judge Sessions' Order. Such actions by Employer fail to establish the requisite demonstration of any "mistake, inadvertence, or excusable neglect" which, even in a trial court setting, would justify relief under a Rule 60(b) Motion.

POINT V. The facts of this case, in any event, fail to demonstrate that Judge Sessions abused his discretion in denying Employer's Rule 60(b) Motion.

The standard of review on an appeal from a denial of a Rule 60(b) Motion, even from a trial court, is one of abuse of discretion. The standard of review as to factual determinations in a Commission Order is, basically, whether that determination was arbitrary, capricious, or an abuse of discretion. In this case, Judge Sessions weighed the underlying facts and decided that Employer's actions were "not indicative of mistake, inadvertence or excusable neglect." When the decision is considered in light of all of the underlying material facts and in a light most favorable to Employee, rather than only the isolated facts set forth by Employer in a light most favorable to Employer upon which Employer seeks to rely, there is no basis for any determination that the Order rejecting Employer's Rule 60(b) Motion was arbitrary, capricious, or an abuse of discretion.

ARGUMENT

POINT I

THE COMMISSION DID NOT ERR IN DETERMINING THAT THE APPLICABLE STATUTES DID NOT AUTHORIZE EMPLOYER'S USE OF ITS RULE 60(b) MOTION TO OBTAIN RELIEF FROM JUDGE SESSIONS' ORDER OF SEPTEMBER 23, 2005

A. NEITHER THE APPLICABLE STATUTES NOR THE COMMISSION'S ADMINISTRATIVE RULES PROVIDE FOR THE USE OF A 60(b) MOTION IN WORKERS' COMPENSATION PROCEEDINGS.

The Order of the Appeals Board from which Employer appeals, under the heading "Discussion and Conclusions of Law,"[50] clearly and succinctly sets forth the underlying bases for their conclusion that Rule 60(b), *Ut. R Civ. P* was not applicable to that proceeding.

In summary, they reviewed the background and language under *UAPA* and noted that the Commission procedures were subject to *UAPA*. They also noted that in two areas, discovery and default, *UAPA* specifically incorporated the standards adopted in the Utah *Rules* but, in others, chose to establish its own procedures. The Appeals Board summarized its analysis as follows:

> In simple terms, the foregoing provisions of UAPA, the Labor Commission Act and the Workers' Compensation Act establish a comprehensive and integrated system that allows the parties to obtain full review and, where appropriate, complete relief from any factual or legal error that may be contained in an ALJ's decision. However, in seeking such relief, the parties must follow the procedures created by those statutes, and nothing in UAPA, the Labor Commission Act, or the Utah Workers' Compensation Act authorizes the use of the procedures found in Rule 60(b) U.R.C.P.[51]

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[50] *Id.* at 461

[51] *Id.* at 462

The Board's conclusion that Rule 60(b) did not apply to the proceeding before it was neither unreasonable, irrational, nor contrary to the governing statutes or rules. There is, in fact, nothing in UAPA which requires the Commission to adopt Rule 60(b) as part of the rules applicable to proceedings before it. Neither is there anything in the *Ut. R. Civ. P.* which does so.

The Utah Supreme Court has previously confirmed that the *Ut. R. Civ. P.* do not extend to administrative hearings such as that before the Commission, finding that service of process for an administrative hearing was not required to be in accordance with those *Rules*[52] and, more recently, that Rule 41 (a) (1) did not apply to administrative matters.[53] As the Court explained:

> [A]dministrative proceedings are not subject to the Utah Rules of Civil Procedure unless the governing statute or regulations so provide.[54]

In the present case, neither the governing statutes nor *Administrative Rules* of the Commission provided that the *Ut. R. Civ. P.* applied to this proceeding. The Workers Compensation Act specifically exempts the Commission and its administrative and review personnel from the application of the provisions of the *Ut. R. Civ. P.*, except as otherwise specified in the Act. It provides, instead, that the Commission "shall make rules governing

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[52]*Entre Nous Club v. Toronto*, 4 Utah 2d 98, 287 P. 2d 670 (1955)

[53]*Pilcher v. State Department of Social Services,* 663 P. 2d 450 (Utah, 1983). See also *State Tax Comm'n v. Iverson*, 782 P. 2d 519 (Utah, 1989)

[54]*Id.*

adjudicative procedures."[55] That Act further provides that, except as provided in it or in *UAPA*, "the rules made under this section are not required to conform to common law or statutory rules of evidence or other technical rules of procedure."[56] The Act also provides:

> The commission, the commissioner, an administrative law judge, or the Appeals Board, is not bound by the usual common law or statutory rules of evidence, or by any technical or formal rules or procedure, other than as provided in this section or as adopted by the commission...[57]

In accordance with the statutory provisions of the Workers' Compensation Act and *UAPA*, the Commission has adopted its own rules of procedure. Rather than a wholesale incorporation by reference, *Administrative Rule* R602-2-1 provides for only limited incorporation of the *Ut R. Civ. P.*[58] Employee submits there is no reference to Rule 60 (b) anywhere in those *Administrative Rules*.

Instead, *Administrative Rule* R602-2-1(M) provides for the review of Orders by Administrative Law Judges and specifies that such review must be requested within thirty days in accordance with the Motion for Review provisions of *Utah Code Anno.* §63-46b-12 and 34A-1-303 (1997).

In the absence of any adoption of Rule 60(b) in those *Administrative Rules*, either by reference or the use of similar procedural language separate and apart from those under

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[55] *Utah Code Anno.* §34A-1-304(1)(a) (1997)

[56] *Utah Code Anno.* §34A-1-304(1)(b) (1997)

[57] *Utah Code Anno* §34A-2-801(1) (1997)

[58] *Supra, note 10*

Administrative Rule R602-2-1(M), there was no basis for the "Rule 60(b)" review of Judge Sessions' Order as sought by Employer. The Commission, therefore, properly dismissed the Employer's Motion, long after the Order was final, seeking such a review.

B. THE COMMISSION'S DECISION IS NOT CONTRARY TO ANY PUBLIC POLICY REQUIREMENT THAT RULE 60(b) RELIEF BE APPLIED TO ITS PROCEEDINGS

Employer's contentions that Rule 60(b) should have been incorporated in some manner by the Workers' Compensation Act, *UAPA* or by the Commission rules, does not change the fact that it was not. Such arguments are not properly addressed to this Court but, rather, should be addressed to the Legislature and/or the Commission's Rulemaking body.

The Supreme Court has considered a situation very similar to that presently asserted by the Employer in its Brief. In *Mini Spas, Inc. v. Industrial Commission,*[59] the Court considered an appeal from the law judge's refusal to consider an untimely protest, in which the issues as asserted by the appellant were (1) whether the Department abused its discretion in refusing to consider the employer's protest to the benefits awarded because the protest was not filed within ten days; and (2) whether the administrative law Judge's refusal to consider the untimely protest contravenes a claimed public policy to relieve a party of default for "mistake" or "excusable neglect" in view of Rule 60 (b)(1).

The Supreme Court rejected the "implied public policy" arguments based on Rule 60(b) (1), explaining:

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[59]1987 UT 13, 733 P. 2d 130 (Utah, 1987)

> It appears to us that the more pertinent public policy to be applied in this case is found in section 35-4-2, section 35-4-10(e) (permitting the Department to prescribe its own procedural rules), and sections 35-4-7, -6, and -10 (imposing various ten day filing requirements.)[60]

Similarly, in the present case, the assertion that there must be some relief similar to Rule 60 (b) before the Commission fails to consider that "more pertinent public policy." In response to the question of what Employer could have done in the present case, the answer is relatively simple. If Employer was unsure of the Order's implications, Employer had the option of timely filing a Motion for Review.

C. THE COMMISSION'S DECISION IS NOT CONTRARY TO THE STATUTORY PROVISIONS PROVIDING FOR MOTIONS FOR RECONSIDERATION

Employer also contends that the Commission's decision is contradicted by *Utah Code Anno.* §63-46b-13 (2001), which specifically allows for written requests for reconsideration with an agency. Motions for Reconsideration of an Order on a Motion for Review are, indeed, part of the statutory process available in workers compensation cases,[61] and are regularly considered by the Commission.[62] Be that as it may, Employer failed to file any Motion for Review, which is the required precursor to a Motion for Reconsideration of a Commission decision.

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[60]*Id.* at 132

[61]*Administrative Rule* R602-2-1 (0) ["A request for reconsideration of an Order on Motion for Review may be allowed and shall be governed by the provisions of Section 63-46b-13"]

[62]See, for instance, the recent case of *McCoy v. Utah Disaster Kleenup*, 467 Ut. Adv. Rep. 23, 2003 UT App. 49 (Utah App., 2003)

Further, if Employer wished its Motion to be treated as a Motion to Reconsider, that Motion would have been required to be timely filed in accordance with the provisions for a Motion to Reconsider, under *Utah Code Anno.* §63-46b-13 (2001). That statute requires:

> (1) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under §63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency . . .

As reflected in its specific terms, that statutory provision has no application where, as in the present case, a Motion for Review could have been filed in a timely manner and was not "unavailable." Employer's assertions that, as a Motion to Reconsider, its Motion was timely filed,[63] is not correct since it was not filed within the required twenty day time limit. Rather, it was not filed for nearly three months after the Order was issued.

D. THE COMMISSION'S DECISION IS NOT CONTRARY TO THE "CONTINUING JURISDICTION" PROVISIONS OF THE WORKERS COMPENSATION ACT

Employer further contends that the Order of the Appeals Board is contradicted by *Career Serv. Review Bd. V. Utah Dept. Of Corrections.*[64] Employer asserts that decision declares that the Commission has the authority to correct its mistakes, even absent a specific statute. Employee submits that case does not stand for that proposition. Rather, as the Court explained in its decision, the issue in that case was whether the administrative agency retained jurisdiction over a matter after an appeal of the decision has been dismissed and if

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[63]Employer's Brief, p. 29

[64]942 P. 2d 933 (Utah, 1997)

so, "whether the agency's continuing jurisdiction includes the authority to modify its previous order *on the basis of subsequently discovered facts.*"[65] (emphasis ours)

That decision was in keeping with numerous other decisions of the Utah courts declaring that the Labor Commission can exercise continuing jurisdiction to modify a prior award, but *only* if there has been some significant change.[66]

Paulsen v. Industrial Commission,[67] cited by Employer, is also wholly consistent with those foregoing decisions in that it requires a "substantial change" in the circumstances in order for the Commission to have authority to modify a prior final Order. In *Paulsen*, the Commission awarded benefits and found that the Employer did not have insurance and was insolvent, so the Fund paid the benefits. Neither party sought review. Subsequently, at the Fund's request, the Administrative Law Judge amended the award to state that the Employer was liable to reimburse the Fund directly. The Court outlined the effect of the "continuing jurisdiction" provisions of the Act as follows:

> We have held that this section gives the Commission broad authority to make substantive changes in its orders *when substantial changes in the circumstances have occurred* [citing cases]. We see no reason that section 35-

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[65] *Id.* at 943

[66] See *Burgess v. Siaperas Sand & Gravel*, 965 P. 2d 583, 587 (Utah App., 1998) ["The basis for reopening a claim is provided by 'evidence of some significant change or new development in the claimant's injury or proof of the previous award's inadequacy."]; *Ortega v. Meadow Valley Construction*, 2000 UT 24, 996 P. 2d 1039 (Utah, 2000) ["(T)he Commission's exercise of its continuing jurisdiction requires 'evidence of some significant change or new development in the claimant's injury or proof of the previous award's inadequacy."]

[67] 770 P. 2d 125 (Utah, 1989)

> 1-78 should not also be construed to permit mere clerical changes in the Commission's orders * * *
>
> The next question is whether the amendment obtained by the Fund was one correcting a clerical error. We think it was. Again, useful analogy may be made to Utah Rule of Civil Procedure 60 (a), which addresses the power of trial courts to correct clerical errors. Under that rule, we have drawn a distinction between "clerical errors," which a court may correct. and "judicial errors,' which it may not. A clerical error is one made in recording a judgment that results in the entry of a judgment which does not conform to the actual intention of the court. On the other hand, a judicial error is one made in rendering the judgment and results in a substantively incorrect judgment. [citing cases][68] (emphasis ours).

As reflected in the foregoing language, and contrary to the assertions of Employer, *Paulsen* does not declare that "[t]he Commission's authority to make substantive changes, which is also undisputed, is comparable to Utah Rule of Civil Procedure 60(b), and allowed in administrative proceedings."[69] To the contrary, *Paulsen* clarifies the fact that the Commission is *without* authority to amend final Orders, other than for mere "clerical errors," where no "substantial change" is demonstrated.

Employee submits that Employer has failed to demonstrate any "substantial change" to justify the correction sought to Judge Sessions' Order of September 23, 2005 and that Employer has failed to meet its burden of establishing that the Appeals Board erred in determining that the Employer's use of a Rule 60(b) Motion was not proper. Such Motions are not available in workers' compensation proceedings before the Labor Commission and no "clerical" error or change of circumstances was demonstrated.

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[68] *Id.* at 130

[69] Employer's Brief, p. 26

POINT II

EMPLOYER FAILED TO PROPERLY MARSHALL THE EVIDENCE

Any appeal from Labor Commission matters is generally highly fact dependent. Since Employer's Brief asserts that the Commission improperly denied its Rule 60 (b) motion, and since the standard of review of any Judge denying a Rule 60 (b) Motion is an "abuse of discretion" standard.[70] it is vital that Employer fully and completely set forth all of the material facts upon which the Order may have been based, so that all of those relevant facts may be properly considered by this Court.

Employer has the duty, in such situations, to carefully and properly "marshal" the evidence before the Commission. They may not select only portions of the material facts to set forth, or set forth only those facts which reflect their claims in the most favorable light. Rather, they must basically act as a "devil's advocate," presenting, "in comprehensive and fastidious order, every scrap of competent evidence introduced" with regard to that motion "which supports the very findings the appellant resists."[71]

Marshaling the evidence on an appeal is a process fundamentally different from that of presenting their claims at the hearing. As the Utah Supreme Court recently explained in *Chen*,[72] in a recent, extensive attempt to reiterate the requirements of marshaling:

> Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position [citing cases] Nor can they simply restate

[70] *Supra*, note 9

[71] *West Valley v. Majestic Inv. Co.*, 818 P. 2d 1311, 1315 (Utah App., 1991)

[72] *Chen v. Stewart*, 2004 UT 82, 100 P. 3d 1177 (Utah, 2004)

> or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact [citing cases] Furthermore, appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court's findings.[73]

The Court went on to emphasize that, "If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone" and "we assume that the evidence supports the trial court's findings."[74]

Rather than marshaling all the evidence in support of the Order, as mandated, Employer has referenced only some of the relevant facts and has referenced the facts from its own point of view. Employee has been required, therefore, to extensively supplement the facts asserted by Employer in an attempt to place all of the relevant facts before the Court.

When all of the material facts are considered, it becomes clearer that this case does not involve some "intentional misinterpretation" of an "ambiguous" Order by Employee's counsel and the Appeals Board, as Employer would have the Court believe. Rather, it involves an Order in which Judge Sessions awarded temporary total disability benefits to Employee for the entire period from the date of her injury through the date she reached medical stability, as Employee had requested, but in which he failed to including the appropriate adjustments for the amounts she was able to earn while engaged in light duty work during that period as detailed in paragraph 12 of the Stipulation of the parties. The material facts further demonstrate that Judge Sessions' error could readily and timely been

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[73] *Id.* at 1195

[74] *Id.* at 1196. See also *Merriam v. Industrial Comm'n,* 812 P. 2d 447, 450 (Utah App., 1991) and *Featherstone v. Industrial Comm'n*, 877 P. 2d 1251, 1254 (Utah App., 1994)

resolved by Employer through a timely Motion for Review to the Labor Commission. As with any other Judgment, when no appeal was timely taken, the Order and the judicial error included in it became final.

POINT III

EMPLOYER, EVEN IN A TRIAL COURT SETTING, WOULD NOT BE PERMITTED TO USE ITS RULE 60(b) MOTION AS A SUBSTITUTE FOR A TIMELY APPEAL

When an appeal is taken from a denial of a Rule 60(b) motion, the only issue properly before the court is the propriety of the denial of that motion. As this Court stated *Franklin Covey Client Sales v. Melvin*, "Appellate review of Rule 60(b) Orders must be narrowed in this manner lest Rule 60(b) become a substitute for timely appeals."[75]

For that same reason, Rule 60(b) Motions based upon Judicial errors of the Court are not permitted. In *Franklin Covey*, this Court affirmed the denial of a Rule 60(b) motion which was based upon Melvin's assertions that the trial court made a mistake in its adoption of findings of fact which were insufficient to support its conclusions of law. The Court explained that wrongly deciding a point of law is not such "mistake, inadvertence, surprise or excusable neglect" as would sustain a Rule 60(b) motion:

> In sum, Melvin has not even attempted to present 'mistakes' for which relief may be obtained under Rule 60(b)(1). Instead, having missed the deadline for appealing the summary judgment and declaratory judgment order, he attempts to enter the 'back door' to the merits of the case by appealing the denial of his Rule 60(b) motions. We reject Melvin's attempt to present for our review issues that would only have been properly before us on a direct, timely appeal from the summary judgment and the resulting declaratory judgment order.[76]

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[75] *Franklin Covey, Supra*, note 9, at ¶ 19

[76] *Id* at ¶25

Utah's Supreme Court has also confirmed that Rule 60(b) is not an appropriate means of correcting a judicial error in a judgment. In *Fisher v. Bybee,*[77] the Court considered a denial of a Rule 60(b) (1) motion which alleged that a judgment was based on a mistaken application of the law. The Court affirmed the denial, explaining:

> Mr. Bybee maintains that Judge Harding mistakenly interpreted section 78-12-22 of the Utah Code when he entered a renewed judgment against him initiated by motion, not a new lawsuit. While the trial court agreed with Mr. Bybee that the debtor judgment should not have been renewed based on Fishers' motion, it did not void the judgment under rule 60(b)(1), holding that rule 60(b)(1) was proper to remedy only a clerical mistake, not a major judicial misapprehension of the law. We agree with the trial Court.[78]

In *Lange v. Eby,*[79] the Supreme Court again considered the appeal from a trial court's denial of a rule 60(b) motion in which Eby claimed he was entitled to be credited with amounts from a prior settlement and sought to have the Court set aside the Judgment until his motion to be credited could be determined. The lower Court denied both motions and Eby appealed. On appeal, Eby attempted to argue that his Rule 60(b) motion was wrongly denied, as well as his motion to be credited with the settlement. The Court limited Eby's appeal to "challenging the grounds for denial of the rule 60(b) motion" on the basis that the Court lacked jurisdiction over his appeal of the Judgment as the time for an appeal had run. Eby then contended that "he is entitled to relief from the judgment because the trial court wrongly denied him relief under rule 60(b) by not crediting him with the Geary settlement

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[77]512 Utah Adv. Rep. 18, 2004 UT 92 (Utah, 2004)

[78]*Id.* at ¶9

[79]2006 UT App. 118, 133 P. 3d 451 (Utah App., 2006)

under *Utah Code Anno* §15-4-3." The Court rejected that argument and affirmed the trial Court's denial of the Rule 60(b) Motion, explaining:

> We agree with Lange that Eby cannot raise the merits of his argument that he should be credited the settlement amount because it is not within the scope of his appeal from the denial of his rule 60(b) motion. We have previously held that a rule 60(b) motion is not the appropriate means to raise a mistake of law. *See* id. at Para. 21 [*Franklin Covey Client Sales v. Melvin*, 2000 UT App 110, Para. 9, 2 P. 3d 451] ("[A]n appeal or motion for a new trial, rather than a [Rule] 60 (b) motion, is the proper avenue to redress mistakes of law committed by the trial judge") (alterations in original) (quotations and citations omitted)). Moreover, although this court analyzed rule 60(b)91), we also noted more generally that an appeal from a 60(b) motion "'does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought.'" *Id.* at para 19 (quoting 12 James Wm. Moore, et al., *Moore's Federal Practice* §60.68[3] (3d ed. 1999)). A rule 60(b) motion cannot "be used as a 'back door' to a direct appeal of the underlying [motions]." *Id* at Para. 23. Instead, we must narrow an appeal of a rule 60(b) order to the denial or grant of relief so that it does not "'become a substitute for timely appeals.'" Id. at Para. 19 (quoting Moore et al., *supra*, §60.68[3]).
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> The Utah Supreme Court endorsed the reasoning of *Franklin Covey* in *Fisher v. Bybee*, 2004 UT 92, 104 P. 3d 1198, and "categorically removed legal error from the realm of mistakes recognized under rule 60(b)(1)." *Id.* at Para. 11. The *Fisher* decision noted that *Franklin Covey* cited *Moore's Federal Practice* in explaining "the rationale for a restrictive rule 60(b) review. *Id.* at Para. 10; *see* also Moore et al., *supra*, §60.68[3]. Eby attempts to avoid the mandate of *Fisher* and *Franklin Covey* by characterizing his motion as being brought under rule 60(b)(4), (5), and (6), not just rule 60(b)(1).
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> However, the essence of Eby's argument is that the trial court committed legal error in not crediting him with settlement, resulting in a void, unfair, and/or inequitable judgment. Moore's treatise, as concurred in by both the *Fisher* and *Franklin Covey* opinions, makes clear that all rule 60(b) motions attacking the legality of a trial court ruling are substitutes for timely appeals and will not succeed. *See* Moore et al., *supra*, §60.68[3].[80]

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[80] *Id.*, at ¶ 7

As reflected in its extensive arguments in its Brief, Employer in the present case is attempting to assert in its appeal that its Rule 60(b) motion was improvidently denied because of Judge Sessions' judicial error in making an award to Employee which was not in accordance with the Stipulation of the parties. As reflected in the foregoing decisions, this Court should properly affirm the dismissal of that Rule 60(b) Motion, even if it should find that Rule 60(b) motions are generally applicable to workers' compensation proceedings. Such action is mandated in accordance with the Court's previous declaration that, "Rule 60(b) motions attacking the legality of a trial court ruling are substitutes for timely appeals and will not succeed."[81]

POINT IV

THE FACTS OF THIS CASE FAIL TO DEMONSTRATE ANY "MISTAKE, INADVERTENCE OR EXCUSABLE NEGLECT" WHICH, EVEN IN A TRIAL COURT SETTING, WOULD JUSTIFY RELIEF PURSUANT TO EMPLOYER'S 60(B) MOTION

Employee certainly recognizes that Judge Sessions' Order of September 23, 2005, was erroneous. However, that Order was not "ambiguous" as claimed by Employer, particularly when considered together with the Medical Panel Report and Stipulation of the Parties which were incorporated into it. The Appeals Board had no difficulty in interpreting that Order as awarding disability benefits at $487.00 per week for the entire period from the date of the Employee's accident (March 18, 1999) to the date she reached medical stability (June 10.

[81] *Id.*

2004)[82] and neither did Employee's Counsel.[83] If Employer found the Order to be ambiguous, as it claims, it had a ready remedy of seeking a Motion for Review to correct that alleged "ambiguity." Rather, as noted by the Commission, the Employer chose to ignore that alleged "ambiguity" and to contest its liability under the Order "based on the attorney's own evaluation of Ms. Clausing's claim and without reference to the terms of Judge Session's decision."[84]

Despite Employer's protests to the contrary, Employer either knew, or reasonably should have known, prior to the issuance of Judge Session's Order, that Employee was seeking an award of temporary disability for the periods set forth in the Court's Order. Employee's Application specified that she was seeking temporary partial disability benefits together with temporary total disability benefits, for the periods of time she was unable to work due to her injuries and treatments.[85] Employee's Pre-hearing Disclosures indicated she was seeking such benefits and noted, "We believe that the full payment of TTD and TPD was not paid after the various knee surgeries. However, there does not seem to be any dispute regarding the dates and we hope to have this issue resolved before the hearing."[86] The parties did, in fact, resolve those disputes regarding the dates and they were incorporated in

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[82] *Supra*, note 3

[83] Employee's Statement of Facts No. 22

[84] *Id* at 461

[85] Employee's Statement of Facts No. 21

[86] Employee's Statement of Facts No. 4

paragraph 12 of the Stipulation.[87] Paragraph 12 specifically set forth the various dates, from the date of Employee's work related injury on March 18, 1999 through the date of the Stipulation, when Employee was able to work in a light duty capacity, as well as the various earnings she had for those dates. It further specified that the Stipulation was executed on September 15, 2004 and that "temporary total or temporary partial disability thereafter will need to be addressed at a later date."[88] The medical panel determined that Employee did not reach medical stability until June 10, 2004, when Dr. Morgan indicated "he had nothing else to offer and her condition had not changed."[89]

Judge Sessions did not consider the late filing of the Objection to the medical panel report filed by Employer. Therefore, the Judge did not consider Employee's Response. However, Employer still received that Response in which Employee once again indicated that temporary total and temporary partial disability benefits had not been paid correctly, as reflected on the income chart at paragraph 12 of the Stipulation, and that, therefore, Employee was requesting "an order for Temporary Total Disability/Temporary Partial Disability through MMI of June 10, 2004, less amounts actually paid, plus 8% interest."[90]

At that point, Employer was also deemed to know the Statutes which provided for temporary total and temporary partial disability benefits for the Employee based upon her

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[87]Employee's Statement of Facts Nos. 5 and 3

[88]Employee's Statement of Facts No. 3

[89]Employee's Statement of Facts No. 6

[90]Employee's Statement of Facts No. 8

ability to engage in light duty work during the period of that disability as reflected at paragraph 12 of the Stipulation.[91]

Given all of the foregoing documentation and information, Employer must be deemed to have known, or at least certainly should have known, upon receipt that Judge Session's Order had awarded Employee Temporary Total Disability benefits for the entire period from the date of her work related injury on March 18, 1999 through the date she reached medical stability on June 10, 2004, at the rate of $487.00 per week[92], which is a total of $126,814.34 (after deduction of the $6,136.60 previously paid). Accumulated interest had accrued at 8% per annum from the dates those payments were due, amounting to an additional $56,747.51 through December 15, 2005, for a total through that date of $183,561.85.[93]

The Appeals Board of the Labor Commission readily understood the clear meaning of that Order[94] as being precisely the same thing understood by Employee and her attorney. The Appeals Board and the Employee and her attorney similarly understood that the Order embodied a legal error as it did not apply appropriate adjustments to the award for the various times during the period of the award when Employee was able to engage in light duty work, as specified in paragraph 12 of the Stipulation which was incorporated in the Order.

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[91]Employee's Statement of Facts No. 9

[92]Judge Sessions' Order, *Supra*, note 11 and Appeals Board Order, *Supra*, note 3

[93]*Supra*, note 25

[94]*Supra*, note 3

Employer knew, or should have known, from reading that Order that the foregoing award had been made to Employer by reason of that Order. Employer either also knew, or reasonably should have known, that Order was not correct and embodied that legal error previously discussed.

If Employer did not understand, for whatever reason, the plain meaning of that Order, and believed that the Order was ambiguous, Employer's obligation remained the same. As specified in that Order, the Employer had 30 days within which to file an appropriate Motion for Review with the Commission or the Appeals Board. Instead, Employer inappropriately chose not to file any such Motion and yet still refused to pay the award.

As reflected in Employee's Statement of Facts, Employee recognized that the Order was in error and attempted to contact Employer's counsel. Beginning within two weeks after entry of the Order, Employee's attorney attempted to call Employer's attorneys and left messages regarding payment of the compensation, but Employer's attorneys did not return her calls. Despite those attempts, it was neither Employee's duty, nor was it appropriate, for her to file a Motion to Review to secure a correction for the benefit of the Employer.

On December 1, 2005, Employee's counsel finally got through to one of Employer's other attorneys and willingly offered to accept the $123,061.20 which should have been awarded by the Court, taking into consideration the offsets referenced in paragraph 12 of the Stipulation, even though Employer had failed to file a Motion for Review. She followed that with her letter dated December 1, 2005, in which she confirmed that offer and attached

computations of that offer as well as the computations of the award as set forth in the Judge's Order.[95]

As the Commission noted, Employer's offer was rejected by Employer's counsel, based on the attorney's own evaluation of Ms. Clausing's claim and without reference to the terms of Judge Session's decision.[96] After rejecting that demand, Employer still took no action to challenge the decision or to pay Employee benefits.

Only after the Employee finally requested, on December 20, 2005, the issuance of an Abstract of the Award, to allow her to seek to enforce the award in Court, did the Employer bother to seek its "Rule 60(b)" relief.[97]

As reflected in prior decisions of the Utah's Courts, with regard to a movant's obligations under a Rule 60(b)(1) Motion. "We have heretofore defined "excusable neglect" as the exercise of "due diligence" by a reasonably prudent person under similar circumstances.[98]

The Court, in *Mini Spas*, specifically considered issues on appeal which were similar to those asserted by Employer throughout its brief, with regard to Rule 60 (b)(1), to-wit:

> (1) whether the Department abused its discretion in refusing to consider the employer's protest to the benefits awarded because the protest was not filed within ten days; and (2) whether the administrative law Judge's refusal to

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[95]Employee's Statement of Facts Nos. 10, 13

[96]Employee's Statement of Facts No. 14

[97]Employee's Findings of Fact Nos. 15, 16, 17

[98]*Mini Spas, Supra*, note 59, at 131. See also *Airkem Intermountain v. Parker*, 30 Utah 2d 65, 513 P. 2d 429 (Utah, 1973)

> consider the untimely protest contravenes a claimed public policy to relieve a party of default for 'mistake' or 'excusable neglect'[99]

The Court, however, rejected the "implied public policy" arguments based on Rule 60(b) (1), explaining:

> It appears to us that the more pertinent public policy to be applied in this case is found in section 35-4-2, section 35-4-10(e) (permitting the Department to prescribe its own procedural rules), and sections 35-4-7, -6, and -10 (imposing various ten day filing requirements.

The Court therefore affirmed the decision of the Board, indicating that those arguments were "without merit" and that:

> [T]he undisputed facts here do not support any claim that the employer diligently acted in a reasonably prudent manner in failing to file its response until three weeks after it was due. With knowledge that the notice was forthcoming and a response was necessary, the employer's neglect or mistake was not excusable.[100]

In *Airkem*[101], the Court similarly refused to overturn the denial of a Rule 60(b) motion by the trial court, where the judgment was entered against a defendant who failed to appear in person or through counsel at the trial, alleging that his attorney had not been able to contact him because he was employed in an adjoining county and gone from early in the morning until late at night, and his wife was ill and had been in a hospital for several months. The Court noted, however:

> In the instant action, defendant was informed in February that the matter would probably be set for trial in early autumn; he also knew of the irregular hours

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[99] *Mini Spas*, *Id.* at 130

[100] *Id.* at 132

[101] *Supra*, note 97

> during which he was present in his home. His failure to contact his counsel under such circumstances from February to September 21 could reasonably be considered as not constituting due diligence by the trial court. Defense counsel was informed in early May of the trial setting in September. his belated efforts ten days prior to trial to contact his client. particularly when there is no allegation as to the means of communication utilized. might reasonably be considered as not indicating due diligence. Since defendant's conduct was not entirely inexcusable. the trial court did not abuse its discretion by refusing to relieve defendant of the judgment.[102]

Employee submits that the actions of Employer and its counsel. as previously outlined and as considered by Judge Sessions. come far short of any exercise of "due diligence" by a reasonably prudent person. Such actions may arguably be claimed to have been due to "oversight or negligence" but they were not such as to constitute "excusable negligence." In any event. it was not an abuse of discretion by Judge Sessions to determine that such actions did not comport with "due diligence" or constitute "excusable neglect."

Under such circumstances. Employer should not now be heard to complain that "public policy" somehow demands that Employer be provided with additional equitable remedies to correct the judicial error of Judge Sessions, even beyond what would be allowed if Rule 60(b) had been "cognizable" in this proceeding.

The Appeals Board of the Labor Commission in the present case properly looked to the provisions of *UAPA*. the Labor Commission Act. and the Utah Workers' Compensation Act. along with its own Rules. and determined that the Employer had a remedy readily available in that it could have timely filed a Motion for Review. As the Board explained:

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[102] *Id* at 431

> This review procedure is well known to attorneys practicing before the Labor Commission. It is simple and inexpensive. It does, however, require that parties carefully read and evaluation the ALJs' decisions within the 30-day period permitted for filing requests for review. In this case, because Frito-Lay never requested review of Judge Sessions' decision, it waived its opportunity to request correction.[103]

Finally, Employer asserts that the "discovery rule" should somehow be applied as in in a fraud case, because "Clausing did not make her unjustified demand based on her admitted misinterpretation of the Order until December 1, 2005"[104] and "Clausing's interpretation of the Order, which she admits is contrary to the evidence, was concealed until December 1, 2005."[105] There is absolutely no support in the record for those outlandish claims. Further, those assertions ignore Employer's own obligations and duty to know and understand the terms of the Order, which it could certainly do as readily as Employee and the Appeals Board could. The record establishes that Employer knew or reasonably should have known of the judicial error when the Order was received. There is, therefore, no basis for the application of a different filing deadline for a Motion for Review through the application of the "discovery rule."

Appropriate review procedures were available for relief from the judicial error contained in Judge Session's Order. As the Appeals Board explained, those procedures required that the Employer "carefully read and evaluate the ALJ's decisions within the 30-

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[103]*Supra*, note 3, at 462

[104]Employer's Brief, p. 29

[105]*Id.*

day period permitted for filing request for review."[106] The failure to do so does not constitute "excusable negligence" within the terms of Rule 60(b). Neither does it justify the application of a "discovery rule" to start the 30-day appeal period running only when the attorney finally realizes that there is an error in the Order.

It should also be noted that, when reviewing an agency's interpretation of its own rules, the Court applies an "intermediate standard of review, deferring to an agency's interpretation as long as it is both reasonable and rational."[107] Given all of the underlying facts of this case, the Commission was neither unreasonable nor irrational in declaring:

> Because Frito-Lay's purported Rule 60(b) Motion was not cognizable in this workers' compensation proceeding, Judge Sessions' decision addressing the merits of the Rule 60(b) motion is a nullity.

POINT V

THE FACTS OF THIS CASE, IN ANY EVENT, FAIL TO DEMONSTRATE THAT JUDGE SESSIONS ABUSED HIS DISCRETION IN DENYING EMPLOYER'S RULE 60(b) MOTION

The Standard of Review on appeal of a trial court's denial of a Rule 60(b) Motion is one of "abuse of discretion." As this Court has previously explained:

> A trial court has discretion in determining whether a movant has shown [Rule 60(b) grounds], and this Court will reverse the trial court's ruling only when there has been an abuse of discretion.[108]

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[106] *Supra*, note 3 at 462

[107] *Barnard & Burk, Supra,* note 7, at 703

[108] *Jensen, Supra,* note 9

Judge Session's Amended Order Denying Rule 60(b) Motion reflects that he fully considered the allegations of the Employer in seeking that Motion and determined that the facts, taken as a whole, demonstrated insufficient grounds for "mistake, surprise, or excusable neglect" adequate to justify the imposition of Rule 60(b) relief. His findings included a determination that:

> Respondent failed to return telephone calls to Petitioner's counsel and grossly neglected to request relief from the order by way of appeal within the 30 days allowed by law and rule for such relief if he in fact was confused by the amended order itself.[109]

Judge Sessions further concluded that the actions of the Employer are "not indicative of mistake, inadvertence or excusable neglect. It would be unjust to set the amended order aside under the facts of this case."[110]

Rule 60(b), after all, does not justify relief for "neglect" but, rather, only for "excusable neglect." As the Court has previously explained, "We have heretofore defined 'excusable neglect' as the exercise of 'due diligence' by a reasonably prudent person under similar circumstances."[111]

Employer has wholly failed to demonstrate that Judge Sessions' actions in denying Employer's Rule 60(b) Motion were arbitrary, capricious, or an abuse of discretion, particularly when all of the relevant facts are considered in a light most favorable to Judge Session's Order. Judge Sessions had the full history of Employer's actions, or want of

[109] *Supra*, note 18, at 335

[110] *Id.*

[111] *Supra,* note 59

actions. before him as previously set forth in Employee's Statement of Facts and as discussed more fully in Point IV. Judge Sessions failure to find "excusable negligence" under such circumstances was neither arbitrary. capricious. nor an abuse of discretion.

CONCLUSION

This Court should affirm the Order of the Appeals Board of the Labor Commission and its dismissal of Employer's Rule 60(b) Motion. Should the Court determine that the Appeals Board improperly determined that Rule 60(b) did not apply to this proceeding. the Court may still affirm the Order of the Appeals Board to the extent it determined. "Judge Sessions' decision of September 23. 2005 is final and remains in effect." This Court has previously declared that an appellate court may affirm a judgment appealed from if it is sustainable on any legal ground or theory apparent on the record. even though that legal ground or theory differs from that stated by the trial court to the be basis of the ruling or action.[112] In the present case. as previously reflected. the relevant facts establish that Judge Session's Order denying Employer's Rule 60(b) Motion was not arbitrary. capricious. or an abuse of discretion and that his Order of September 23. 2005 should remain final and in effect. It would. therefore. be appropriate for this Court to affirm the Appeal Board's Order, even if it determines that Rule 60(b) does apply to this proceeding. leaving Judge Session's Amended Findings of Fact. Conclusions of Law and Order to Correct Benefit Computation Omission. dated September 23. 2005. in place.

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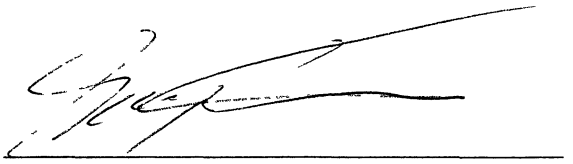
[112] *Ivie v. Hickman*. 2004 UT App 469. ¶8. n. 3. 105 P. 3d 946 (Utah App.. 2004). See also *Barnard & Burk, Supra*, note *7 at n. 6*

Respectfully Submitted this 10th day of April, 2007

By: 

Gary E. Atkin, SB# 0144
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ADDENDUM
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ADDENDUM
NO. 1

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

AMY ZACHER-CLAUSING, Petitioner, vs. FRITO LAY, Respondent.	AMENDED ORDER DENYING RULE 60(b) MOTION FILED BY RESPONDENT AND DENYING RECONSIDERATION OF THE ORDER Case No. 2003892 Judge Dale W Sessions

PROCEDURAL HISTORY OF THE CASE

The ALJ issued a final order in this case dated August 23, 2005. The Order was Amended and re-issued September 23, 2005. Copies of the decision were mailed to all parties. No timely appeal was filed in this case. The Ruling became the final order of the Labor Commission because no appeal was in fact filed. On December 21, 2005, Respondent filed a motion entitled "RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT." On January 3, 2006, Petitioner filed an opposition to the motion. On January 13, 2006, a Reply was filed by Respondent. On January 17, 2006 Respondent filed a pleading entitled "SUPPLEMENTAL FILING IN SUPPORT OF RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT." On January 23, 2006 Petitioner countered that filing with a Motion to STRIKE SUPPLEMENTAL FILING February 6, 2006 Respondent filed a MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE SUPLEMENTAL FILING.

FINDINGS OF FACT

1 It is undisputed that the amended final order in this case was entered September 23, 2005.

2 It is undisputed that no appeal was filed within the 30 days following the amended final order.

3 It is undisputed that Respondent filed a Rule 60(b) motion on December 21, 2005. This filing was the 90th day past the entry of the final order.

CONCLUSIONS OF LAW

Respondent asks the ALJ to set aside the amended order of September 23, 2005 on the grounds of mistake, surprise and excusable neglect pursuant to Utah Rules of Civil Procedure Rule 60(b)(1).

Utah Rule of Civil Procedure 60(b) contains the following language:

> ". . . On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect. . . . [F]or reasons [contained in] (1) . . . the motion shall be made not more than 3 months after the judgment, order, or proceeding was entered or taken."

Respondent filed his motion 90 days after the entry of the final order. However, spondent has failed to make his case out for the relief requested in that insufficient grounds for stake, surprise or excusable neglect exists. Respondent failed to return telephone calls to titioner's counsel and grossly neglected to request relief from the order by way of appeal thin the 30 days allowed by law and rule for such relief if he in fact was confused by the ıended order itself.

Given the history of the attempts to communicate between counsel after the order ıued, and the fact that Respondent waited too long to file an appeal, it would be unjust for the der to be set aside at this time. If Respondent was truly confused, his efforts should have cused on clearing that confusion by way of motion for review within the appropriate period stead of trying to rescue the delay by this method. In addition, Respondent advances the fidavit of Andrew Wadsworth which demonstrates that Respondent intended to dispute the aimed amount, but only announced that to Counsel for Petitioner on December 1, 2005, a ɛriod still beyond the appeal period. Then, some 20 days later Respondent filed the current ıotion. This is not indicative of mistake, inadvertence or excusable neglect. It would be unjust) set the amended order aside under the facts of this case.

Because it would be unjust to set aside the amended order under the circumstances of ıis case, and because the proof as grounds for the motion is inadequate the motion to set aside nder URCP 60(b) must be denied.

Utah Administrative Procedures Act (hereinafter UAPA) provisions establish that an ggrieved party may file for agency review of a final order by filing a written request for review vithin 30 days after the issuance of the order. Utah Code Ann., §63-46b-12(1) et seq. Petitioner ailed to exercise the timely appeal right for this case.

UAPA provisions also discuss obtaining relief from an order by having an order set ıside. However, the statute only addresses relief from a default order and the order in this case was not a default order. See Utah Code Ann., §63-46b-11. These provisions do not rescue a ɔase where a final order has entered which is not a default order.

Because no appeal was taken, and because the motion for relief from judgment was led without sufficient grounds made out as required in Rule 60, Utah Rules of Civil Procedure s outlined above, the Rule 60(b) Motion For Relief From Judgment must be denied

IT IS THEREFORE ORDERED· that the Rule 60(b) Motion for Relief from udgment filed by Respondent is denied.

DATED THIS March 17, 2006.

UTAH LABOR COMMISSION

Dale W Sessions
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Order was mailed by prepaid U.S. postage on March 17, 2006, to the persons/parties at the following addresses:

Amy Zacher-Clausing
1322 Sonata St
Salt Lake City UT 84116

Frito Lay
6301 W 4700 S
Kearns UT 84118

ADDENDUM
NO. 2

R602-2. Labor Commission, Adjudication.
R602-2. Adjudication of Workers' Compensation and Occupational Disease Claims.
R602-2-1. Pleadings and Discovery.

A. Definitions.

1. "Commission" means the Labor Commission.

2. "Division" means the Division of Adjudication within the Labor Commission.

3. "Application for Hearing" means the request for agency action regarding a workers' compensation claim.

4. "Supporting medical documentation" means a Summary of Medical Record or other medical report or treatment note completed by a physician that indicates the presence or absence of a medical causal connection between benefits sought and the alleged industrial injury.

5. "Authorization to Release Medical Records" is a form authorizing the injured workers' medical providers to provide medical records and other medical information to the commission or a party.

6. "Supporting documents" means supporting medical documentation, list of medical providers, Authorization to Release Medical Records and, when applicable, an Appointment of Counsel form.

7. "Petitioner" means the person or entity who has filed an Application for Hearing.

8. "Respondent" means the person or entity against whom the Application for Hearing was filed.

9. "Discovery motion" includes a motion to compel or a motion for protective order.

B. Application for Hearing.

1. Whenever a claim for compensation benefits is denied by an employer or insurance carrier, the burden rests on the injured workers, or medical provider, to initiate agency action by filing an Application for Hearing with the Division. Applications for hearing shall include an original, notarized Authorization to Release Medical Records.

2. An employer or insurance carrier, or any other party with standing under the Workers' Compensation Act may obtain a hearing before the Adjudication Division by filing a request for agency action with the Division.

3. All Applications for Hearing shall include any available supporting medical documentation of the claim where

there is a dispute over medical issues. Applications for Hearing without supporting documentation and a properly completed Authorization to Release Medical Records may not be mailed to the employer or insurance carrier for answer until the appropriate documents have been provided. In addition to respondent's answer, a respondent may file a motion to dismiss the Application for Hearing where there is no supporting medical documentation filed to demonstrate medical causation when such is at issued between the parties.

4. When an Application for Hearing with appropriate supporting documentation is filed with the Division, the Division shall forthwith mail to the respondents a copy of the Application for Hearing, supporting documents and Notice of Formal Adjudication and Order for Answer.

5. In cases where the injured worker is represented by an attorney, a completed and signed Appointment of Counsel form shall be filed with the Application for Hearing or upon retention of the attorney.

C. Answer.

1. The respondent(s) shall have 30 days from the date of mailing of the Order for Answer, to file a written answer to the Application for Hearing.

2. The answer shall admit or deny liability for the claim and shall state the reasons liability is denied. The answer shall state all affirmative defenses with sufficient accuracy and detail that the petitioner and the division may be fully informed of the nature and substance of the defenses asserted.

3. All answers shall include a summary of benefits which have been paid to date on the claim, designating such payments by category, i.e. medical expenses, temporary total disability, permanent partial disability, etc.

4. When liability is denied based upon medical issues, copies of all available medical reports sufficient to support the denial of liability shall be filed with the answer.

5. If the answer filed by the respondents fails to sufficiently explain the basis of the denial, fails to include available medical reports or records to support the denial, or contains affirmative defenses without sufficient factual detail to support the affirmative defense, the Division may strike the answer filed and order the respondent to file within 20 days, a new answer which conforms with the requirements of this rule.

6. All answers must state whether the respondent is willing to medicate the claim.

7. Petitioners are allowed to timely amend the Application for Hearing, and respondents are allowed to timely amend the answer, as newly discovered information becomes available that would warrant the amendment. The parties shall not amend their pleading later than 45 days prior to the scheduled hearing without leave of the Administrative Law Judge.

8. Responses and answers to amended pleadings shall be filed within ten days of service of the amended pleading without further order of the Labor Commission.

D. Default.

1. If a respondent fails to file an answer as provided in Subsection C above, the Division may enter a default against the respondent.

2. If default is entered against a respondent, the Division may conduct any further proceedings necessary to take evidence and determine the issues raised by the Application for Hearing without the participation of the party in default pursuant to Section 63-46b-11(4), Utah Code.

3. A default of a respondent shall not be construed to deprive the Employer's Reinsurance Fund or Uninsured Employers' Fund of any appropriate defenses.

4. The defaulted party may file a motion to set aside the default under the procedures set forth in Section 63-46b-11(3), Utah Code. The Adjudication Division shall set aside defaults upon written and signed stipulation of all parties to the action.

E. Waiver of Hearing.

1. The parties may, with the approval of the administrative law judge, waive their right to a hearing and enter into a stipulated set of facts, which may be submitted to the administrative law judge. The administrative law judge may use the stipulated facts, medical records and evidence in the record to make a final determination of liability or refer the matter to the Medical Panel for consideration of the medical issues pursuant to R602-2-2.

2. Stipulated facts shall include sufficient facts to address all the issues raised in the Application for Hearing and answer.

3. In cases where Medical Panel review is required, the administrative law judge may forward the evidence in the record, including but not limited to, medical records, fact stipulations, radiographs and deposition transcripts, to a medical panel for assistance in resolving the medical issues.

F. Discovery.

1. Upon filing the answer, the respondent and the petitioner may commence discovery. Discovery allowed under this rule may include interrogatories, requests for production of documents, depositions, and medical examinations. Discovery shall not include requests for admissions. Appropriate discovery under this rule shall focus on matters relevant to the claims and defenses at issue in the case. All discovery requests are deemed continuing and shall be promptly supplemented by the responding party as information comes available.

2. Without leave of the administrative law judge, or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts, to be answered by the party served. The frequency or extent of use of interrogatories, requests for production of documents, medical examinations and/or depositions shall be limited by the administrative law judge if it is determined that:

a. The discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive;

b. The party seeking discovery has had ample opportunity by discovery in the action to obtain the discovery sought; or

c. The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties; resources, and the importance of the issues at stake in the adjudication.

3. Upon reasonable notice, the respondent may require the petitioner to submit to a medical examination by a physician of the respondent's choice.

4. All parties may conduct depositions pursuant to the Utah Rules of Civil Procedure and Section 34A-1-308, Utah Code.

5. Requests for production of documents are allowed, but limited to matters relevant to the claims and defenses at issue in the case, and shall not include requests for documents provided with the petitioner's Application for Hearing, nor the respondents' answer.

6. Parties shall diligently pursue discovery so as not to delay the adjudication of the claim. If a hearing has been scheduled, discovery motions shall be filed no later than 45 days prior to the hearing unless leave of the administrative law judge is obtained.

7. Discovery motions shall contain copies of all relevant documents pertaining to the discovery at issue, such as mailing

certificates and follow up requests for discovery. The responding party shall have 10 days form the date the discovery motion is mailed to file a response to the discovery motion.

8. Parties conducting discovery under this rule shall maintain mailing certificates and follow up letters regarding discovery to submit in the event Division Intervention is necessary to complete discovery. Discovery documents shall not be filed with the Division at the time they are forwarded to opposing parties.

9. Any party who fails to obey an administrative law judge's discovery order shall be subject to the sanctions available under Rule 37, Utah Rules of Civil Procedure.

G. Subpoenas.

1. Commission subpoena forms shall be used in all discovery proceedings to compel the attendance of witnesses. All subpoenas shall be signed by the administrative law judge assigned to the case, or the duty judge where the assigned judge is not available. Subpoenas to compel the attendance of witnesses shall be served at least 14 days prior to the hearing consistent with Utah Rule of Civil Procedure 45. Witness fees and mileage shall be paid by the party which subpoenas the witness.

2. A subpoena to produce records shall be served on the holder of the record at least 14 days prior to the date specified in the subpoena has provided in Utah Rule of Civil Procedure 45. All fees associated with the production of documents shall be paid by the party which subpoenas the record.

H. Medical Records Exhibit.

1. The parties are expected to exchange medical records during the discovery period.

2. Petitioner shall submit all relevant medical records contained in his/her possession to the respondent for the preparation of a joint medical records exhibit at least twenty (20) working days prior to the scheduled hearing.

3. The respondent shall prepare a joint medical record exhibit containing all relevant medical records. The medical record exhibit shall include all relevant treatment records that tend to prove or disprove a fact in issue. Hospital nurses' notes, duplicate materials, and other non-relevant materials need not be included in the medical record exhibit.

4. The medical records shall be indexed, paginated, arranged by medical care provider in chronological order and bound.

5. The medical record exhibit prepared by the respondent shall be delivered to the Division and the petitioner or petitioner's counsel at least ten (10) working days prior to the hearing. Late-filed medical records may or may not be admitted at the discretion of the administrative law judge by stipulation or for good cause shown.

6. The administrative law judge may require the respondent to submit an additional copy of the joint medical record exhibit in cases referred to a medical panel.

7. The petitioner is responsible to obtain radiographs and diagnostic films for review by the medical panel. The administrative law judge shall issue subpoenas where necessary to obtain radiology films.

I. Hearing.

1. Notices of hearing shall be mailed to the addresses of record of the parties. The parties shall provide current addresses to the Division for receipt of notices or risk the entry of default and loss of the opportunity to participate at the hearing.

2. Judgment may be entered without a hearing after default is entered or upon stipulation and waiver of a hearing by the parties.

3. No later than 45 days prior to the scheduled hearing, all parties shall file a signed pretrial disclosure form that identifies; (1) fact witnesses the parties actually intend to call at the hearing; (2) expert witnesses the parties actually intend to call at the hearing; (3) language translator the parties intend to use at the hearing; (4) exhibits, including reports, the parties intent to offer in evidence at the hearing; (5) the specific benefits or relief claimed by the petitioner; (6) the specific defenses that the respondent actually intends to litigate; (7) whether or not a party anticipates that the case will take more than four hours of hearing time; (8) the job categories or titles the respondents claim the petitioner is capable of performing if the claim is for permanent total disability, and; (9) any other issues that the parties intend to ask the administrative law judge to adjudicate. The administrative law judge may exclude witnesses, exhibits, evidence, claims, or defenses as appropriate of any part who fails to timely file a signed pre-trial disclosure form as set forth above. The parties shall supplement the pre-trial disclosure form with information that newly becomes available after filing the original form. The pre-trial disclosure form

does not replace other discovery allowed under these rules.

4. If the petitioner requires the services of language translation during the hearing, the petitioner has the obligation of providing a person who can translate between the petitioner's native language and English during the hearing. If the respondents are dissatisfied with the proposed translator identified by the petitioner, the respondents may provide a qualified translator for the hearing at the respondent's expense.

5. The petitioner shall appear at the hearing prepared to outline the benefits sought, such as the periods for which compensation and medical benefits are sought, the amounts of unpaid medical bills, and a permanent partial disability rating, if applicable. If mileage reimbursement for travel to receive medical care is sought, the petitioner shall bring documentation of mileage, including the dates, the medical provider seen and the total mileage.

6. The respondent shall appear at the hearing prepared to address the merits of the petitioner's claim and provide evidence to support any defenses timely raised.

7. Parties are expected to be prepared to present their evidence on the date the hearing is scheduled. Requests for continuances may be granted or denied at the discretion of the administrative law judge for good cause shown. Lack of diligence in preparing for the hearing shall not constitute good cause for a continuance.

8. Subject to the continuing jurisdiction of the Labor Commission, the evidentiary record shall be deemed closed at the conclusion of the hearing, and no additional evidence will be accepted without leave of the administrative law judge.

J. Motions-Time to Respond.

Responses to all motions other than discovery motions shall be filed within ten (10) days from the date the motion was filed with the Division. Reply memoranda shall be filed within seven (7) days from the date a response was filed with the Division.

K. Notices.

1. Orders and notices mailed by the division to the last address of record provided by a party are deemed served on that party.

2. Where an attorney appears on behalf of a party, notice of an action by the Division served on the attorney is considered notice to the party represented by the attorney.

L. Form of Decisions.

Decisions of the presiding officer in any adjudicative

proceeding shall be issued in accordance with the provisions of Section 63-46b-5 or 63-45b-10, Utah Code.

M. Motions for Review.

1. Any party to an adjudicative proceeding may obtain review of an Order issued by an Administrative Law Judge by filing a written request for review with the Adjudication Division in accordance with the provisions of Section 63-46b-12 and Section 34A-1-303, Utah Code. Unless a request for review is properly filed, the Administrative Law Judge's Order is the final order of the Commission. If a request for review is filed, other parties to the adjudicative proceeding may file a response within 20 calendar days of the date the request for review was filed. Thereafter the Administrative Law Judge shall:

a. Reopen the case and enter a Supplemental Order after holding such further hearing and receiving such further evidence as may be deemed necessary;

b. Amend or modify the prior Order by a Supplemental Order; or

c. Refer the entire case for review under Section 34A-2-801, Utah Code.

2. If the Administrative Law Judge enters a Supplemental Order, as provided in this subsection, it shall be final unless a request for review of the same is filed.

N. Procedural Rules.

In formal adjudicative proceedings, the Division shall generally follow the Utah Rules of Civil Procedure regarding discovery and the issuance of subpoenas, except as the Utah Rules of Civil Procedure are modified by the express provisions of Section 34A-2-802, Utah Code or as may be otherwise modified by these rules.

O. Requests for Reconsideration and Petitions for Judicial Review.

A request for consideration of an Order on Motion for Review may be allowed and shall be governed by the provisions of Section 63-46b-13, Utah Code. Any petition for judicial review of final agency action shall be governed by the provisions of Section 63-46b-14, Utah Code.

R602-2-2. Guidelines for Utilization of Medical Panel.

Pursuant to Section 34A-2-601, the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge

ADDENDUM
NO. 3

jured Entwistle Co. v. Wilkins, 626 P.2d 495 (Utah 1981).

Validity of award.

Award of compensation for temporary total disability in addition to compensation for loss of limb cannot be allowed generally, but such award was properly allowed where unexpected complications arose making it impossible for injured employee to use artificial limb until another amputation could be performed. Spring Canyon Coal Co. v. Industrial Comm'n, 60 Utah 553, 210 P. 611 (1922).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation § 567 to 572.

34A-2-411. Temporary partial disability — Amount of payments.

(1) If the injury causes temporary partial disability for work, the employee shall receive weekly compensation equal to:

(a) 66 2/3% of the difference between the employee's average weekly wages before the accident and the weekly wages the employee is able to earn after the accident, but not more than 100% of the state average weekly wage at the time of injury; plus

(b) $5 for a dependent spouse and $5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but only up to a total weekly compensation that does not exceed 100% of the state average weekly wage at the time of injury.

(2) The commission may order an award for temporary partial disability for work at any time prior to 12 years after the date of the injury to an employee:

(a) whose physical condition resulting from the injury is not finally healed and fixed 12 years after the date of injury; and

(b) who files an application for hearing under Section 34A-2-417.

(3) The duration of weekly payments may not exceed 312 weeks nor continue more than 12 years after the date of the injury. Payments shall terminate when the disability ends or the injured employee dies.

History: C. 1953, 35-1-65.1, enacted by L. 1981, ch. 287, § 2; 1988, ch. 116, § 2; 1990, ch. 69, § 2; renumbered by L. 1996, ch. 240, § 154; renumbered by L. 1997, ch. 375, § 119; 1999, ch. 261, § 2.

Amendment Notes. — The 1997 amendment, effective July 1, 1997, renumbered this section, which formerly appeared as § 35A-3-411, substituted 'commission' for 'department" in Subsection (2) and "34A-2-417" for "35A-3-417" in Subsection (2)(b), and made stylistic changes.

The 1999 amendment, effective May 3, 1999, substituted "12 years" for 'eight years' in two places in Subsection (2) and in Subsection (3).

34A-2-412. Permanent partial disability — Scale of payments.

(1) An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 34A-2-417 may receive a permanent partial disability award from the commission.

ADDENDUM

NO. 4

ATKIN & ASSOCIATES
ATTORNEYS AT LAW

[illegible] SOUTH STATE • SUITE 380 • SALT LAKE CITY, UTAH 8111
AREA CODE 80 • TELEPHONE [illegible]
FAX 52 [illegible]

September 12, 2005

Hon. Dale Sessions
LABOR COMMISSION OF UTAH
P.O. Box 146615
Salt Lake City, Utah 84114-6615

Re: Amy Clausing
Case No. 2003892
Response to Respondent's Objection to the Medical Panel Report.

Dear Judge Sessions,

Please accept this letter as our Response to Respondent's Objection to the Medical Panel Report. We agree with Respondents that the 5% PPD has already been paid, but we disagree that the parties stipulated to a stabilization date.

In 2002, the parties stipulated that a 5% rating of the low back was due to the original injury date of 18 March 1999, as opposed to the resulting fall down the stairs which occurred on 21 May 2000. It makes no difference from a legal standpoint if the impairment is based on the 1999 industrial accident or the resulting fall in 2000. We agree that the 5% low back impairment has been paid by Respondents and no additional impairment is due.

We disagree that Petitioner stipulated to stabilization date of January 14, 2002. There is no such stipulation outlined in writing. January 14, 2002 was the date of a hearing at which the parties agreed to certain specifically outlined benefits being paid. A hearing date is no basis for a determination of the completion of petitioner's medical treatment and stabilization of her medical condition. In fact, the Stipulation itself implies that the petitioner was not stable. It includes payment of the ongoing medical care and physical therapy by Dr. Morgan (Order dated October 22, 2002, page 4.)

Furthermore, impairment ratings do not equate to stabilization as claimed by respondents. Stability is defined by the Utah 2002 Impairment Guides, page 9 as,

> Medical stability (MMI) or fixed state of recovery, refers to a date in which the period of healing has ended **and** the condition of the worker is not expected to materially improve or deteriorate by more than 3% Whole Person in the ensuing year. . .**The date of medical stability and the date when the workers qualifies for an impairment rating can be two separate dates.** (Emphasis added)

This definition and the separation of stabilization and impairment is taken directly from Booms v. Rapp 720 P2d 1363 (Utah 1986). In Booms, the claimant argued that stopping payment of temporary total benefits upon medical stabilization left him with a "gap" between the time he reached stabilization and the time his permanent partial disability began. The Supreme Court of Utah found this difference in the stabilization date and the payment of impairment was appropriate and there is no requirement that they occur on the same date.

Finally, I must admit to being confused by respondents claim of a stipulated stabilization date. The current Stipulation of Facts and Proposed Medical Panel Questions includes a complete outline of petitioner's income from 1999 to 2004 so that Temporary Partial Disability could be calculated if petitioner was found not to be at MMI. (Stipulation of Fact and Proposed Medical Panel Questions, pg 5.) Stabilization was a primary issue in this case as reflected in the parties stipulated Proposed Question #3, "3. If the fusion surgery is not reasonable, has petitioner reached MMI?" I do not understand why respondents would now argue that we stipulated to a January 14, 2002 MMI date.

We respectfully request that the Medical Panel Report be admitted into evidence.

It appears that TTD and TPD have not been paid correctly throughout this claim. (Compare TTD paid, Stipulation page 3, with the income chart, Stipulation pg 5.) Therefore, we request an Order for Temporary Total Disability/Temporary Partial Disability through MMI of June 10, 2004, less amounts actually paid, plus 8% interest. I would be happy to prepare a chart of these benefits if that would be helpful.

In addition, in accordance with the Medical Panel Report, we request an Order for payment of medical care to date; immediate approval of the recommended treatment of knee injections; and payment of future medical care related to the treatment of the low back and right knee, including the traumatic arthritis which may develop. We understand that based on the Medical Panel Report, workers compensation coverage for the stroke and cervical injury will be denied.

Very truly yours,

ATKIN & ASSOCIATES,

K. Dawn Atkin, Esq.

DA/d

c: Amy Clausing
Theodore Kanell/Andrew Wadsworth

ADDENDUM
NO. 5

ATKIN & ASSOCIATES
ATTORNEYS AT LAW

K. DAWN ATKIN, ESQ.
1111 E. BRICKYARD ROAD • SUITE 206 • SALT LAKE CITY, UTAH 84106
AREA CODE 801 • TELEPHONE 521-2552
SAN: 479-0634

December 1, 2005

Theodore E. Kanell, Esq
Andrew Wadsworth, Esq.
PLANT, WALLACE, CHRISTENSEN & KANELL
136 South Temple STE 1700
Salt Lake City, Utah 84111-1131

Re: Amy Clausing

Dear Ted and Andrew:

Judge Sessions entered the Order in this case on September 23, 2005. To date it has not been paid. I have computed the TTD/TPD due, including credit for the benefits paid. My chart is attached. Gary was nice enough to compute the interest for us. His printout is attached as well.

The total comes to $92,956.46 in TTD/TPD and $30,104.76 in simple interest at 8% for a total of $123,061.20.

Please note that PPD has been paid in full and is not addressed in these computations.

Since it has been over 60 days since the Order, I was preparing these numbers to request an abstract. However, when I realized how complicated the numbers were, I assumed you had not yet had a chance to compute them. Therefore, I will delay any action until December 15th in the hope that we can get the check issued before that date. Although our interest calculations end as of December 1st, if the benefits are paid on or before December 15th, we will not request additional interest.

Please let me know if I can assist you in interpreting these charts, or provide additional information.

Very truly yours,

ATKIN & ASSOCIATES,

K. Dawn Atkin, Esq.

KDA/d
Enclosures
cc: Amy Clausing

Amy Clausing

ORDERED
March 18, 1999 - June 10, 2004 at $487.00 per week
=272 Weeks at 487.00(max) per week
=$132,464 plus 8% interest

AMOUNTS PAID
TTD August 17, 200 to October 25, 2000 = $5,090.00
January 2, 2001 = $72.66
April 9, 200 - April 22, 2002 = $974.00

NOTE: DESPITE ORDER, CLIENT WORKED. TPD APPLIES:
Wage rate is $900.00 per week/ TTD max is 487.00
Dates/wages earned taken from Stipulation of Facts

3/18/99 - 5/7/99
7.28 Weeks @
$900 - 400 x 66.67% =$333.35 $2,426.79

5/8/99 - 12/29/99
33.71 weeks @
900-228X66.67%=$448.02 $15,102.75

12/30/99-1/10/00 TTD
1.71 Weeks @ $487 $832.77

1/11/00 - 2/28/00
7 weeks @
900-456 X 66.67%=$296.01 $2,072.07

3/1/00 - 4/30/00
8.71 weeks@
900-228X66.67%=$448.02 $3,902.25

5/1/00-5/20/00
2.86 weeks@
900-456X66.67%=$296.01 $846.58

5/21//00 - 5/30/00 TTD
1.43 weeks@ $487.00 $696.41

5/31/00-6/21/00
3 14 weeks@
900-456X66.67%=296.01 $929.47

6/22/00-6/28/00 TTD
1 weeks@$487 $487.00

6/29/00 - 8/16/00
7 weeks@
900-456X66.67%=$296.01 $2,072.07

8/17/00-10/25/00 **$5,090.00 PAID**

10/26/00-1/1/01
9.71 weeks @
900-456X66.67%=$296.01 $2,874.26

1/02/01 **$72.66 PAID**

1/3/01-4/4/02
65.14 weeks@
900-456X66.67%=$296.01 $19,282.09

4/5/02-4/8/02 TTD
.57 weeks@$487 $277.59

4/9/02-4/22/02 **$974.00 PAID**

4/23/02 - 5/30/02
5.43 weeks@
900-228X66.67%=$448.02 $2,432.74

5/31/02-10/19/02
20.28 weeks@
900-456X66.67%=$296.01 $6,003.08

10/20/02 to 5/4/03
28.14 weeks@
900-499.20X66.67%=$267.21 $7,519.28

5/5/03-2/28/04 TTD
42.86 weeks@487 $20,872.82

3/1/04 to 5/25/04
12.28 weeks@
900-480X66.67%=$280.01 $3,438.52

5/26/04 - 6/10/04 (MMI) TTD
2.28 weeks@487 $1,110.36

Benefit	int rate/wk	#weeks	int due
333.35	0.001538	349	178.9833
333.35	0.001538	348	178.4705
333.35	0.001538	347	177.9576
333.35	0.001538	346	177.4448
333.35	0.001538	345	176.9319
333.35	0.001538	344	176.4191
333.35	0.001538	343	175.9062
411.42	0.001538	342	216.4702
448.02	0.001538	341	235.0382
448.02	0.001538	340	234.3489
448.02	0.001538	339	233.6597
448.02	0.001538	338	232.9704
448.02	0.001538	337	232.2811
448.02	0.001538	336	231.5919
448.02	0.001538	335	230.9026
448.02	0.001538	334	230.2134
448.02	0.001538	333	229.5241
448.02	0.001538	332	228.8348
448.02	0.001538	331	228.1456
448.02	0.001538	330	227.4563
448.02	0.001538	329	226.767
448.02	0.001538	328	226.0778
448.02	0.001538	327	225.3885
448.02	0.001538	326	224.6993
448.02	0.001538	325	224.01
448.02	0.001538	324	223.3207
448.02	0.001538	323	222.6315
448.02	0.001538	322	221.9422
448.02	0.001538	321	221.253
448.02	0.001538	320	220.5637
448.02	0.001538	319	219.8744
448.02	0.001538	318	219.1852
448.02	0.001538	317	218.4959
448.02	0.001538	316	217.8066
448.02	0.001538	315	217.1174
448.02	0.001538	314	216.4281
448.02	0.001538	313	215.7389
448.02	0.001538	312	215.0496
448.02	0.001538	311	214.3603
448.02	0.001538	310	213.6711
448.02	0.001538	309	212.9818
487	0.001538	308	230.7631
428.65	0.001538	307	202.4547
296.01	0.001538	306	139.3524
296.01	0.001538	305	138.897
296.01	0.001538	304	138.4416
296.01	0.001538	303	137.9862
296.01	0.001538	302	137.5308
296.01	0.001538	301	137.0754
335.62	0.001538	300	154.9015
448.02	0.001538	299	206.0892
448.02	0.001538	298	205.3999
448.02	0.001538	297	204.7107
448.02	0.001538	296	204.0214
448.02	0.001538	295	203.3322
448.02	0.001538	294	202.6429
448.02	0.001538	293	201.9536
448.02	0.001538	292	201.2644

REJECT
HALT

296 01	0 001538	290	132 066
290 01	0 001538	289	131 6106
428 65	0 001538	288	189 9249
428 65	0 001536	287	189 2655
290 01	0 001538	286	130 2444
296 01	0 001538	285	129 789
322 75	0 001538	284	141 0169
460 26	0 001538	283	200 3901
296 01	0 001536	282	126 4228
296 01	0 001536	281	127 9674
296 01	0 001538	280	127 512
296 01	0 001538	279	127 0566
296 01	0 001538	278	126 6012
296 01	0 001538	277	126 1458
64 57	0 001538	276	14 67895
0	0 001538	275	0
0	0 001538	274	0
0	0 001538	273	0
0	0 001538	272	0
0	0 001538	271	0
0	0 001538	270	0
0	0 001538	269	0
0	0 001538	268	0
0	0 001538	267	0
0	0 001538	266	0
296 01	0 001538	265	120 681
296 01	0 001538	264	120 2256
296 01	0 001538	263	119 7702
296 01	0 001538	262	119 3148
296 01	0 001538	261	118 8594
296 01	0 001538	260	118 404
296 01	0 001538	259	117 9486
296 01	0 001538	258	117 4932
296 01	0 001538	257	117 0378
223 35	0 001538	256	87 96554
296 01	0 001538	255	116 127
296 01	0 001538	254	115 6716
296 01	0 001538	253	115 2162
296 01	0 001538	252	114 7608
296 01	0 001538	251	114 3054
296 01	0 001538	250	113 85
296 01	0 001538	249	113 3946
296 01	0 001538	248	112 9392
296 01	0 001538	247	112 4838
296 01	0 001538	246	112 0284
296 01	0 001538	245	111 573
296 01	0 001538	244	111 1176
296 01	0 001538	243	110 6622
296 01	0 001538	242	110 2068
296 01	0 001538	241	109 7514
296 01	0 001538	240	109 296
296 01	0 001538	239	108 8406
296 01	0 001538	238	108 3852
296 01	0 001538	237	107 9298
296 01	0 001538	236	107 4744
296 01	0 001538	235	107 019
296 01	0 001538	234	106 5636
296 01	0 001538	233	106 1082

296.01	0.001538	230	104.742
296.01	0.001538	229	104.2866
296.01	0.001538	228	103.8312
296.01	0.001538	227	103.3758
296.01	0.001538	226	102.9204
296.01	0.001538	225	102.465
296.01	0.001538	224	102.0096
296.01	0.001538	223	101.5542
296.01	0.001538	222	101.0988
296.01	0.001538	221	100.6434
296.01	0.001538	220	100.188
296.01	0.001538	219	99.7326
296.01	0.001538	218	99.2772
296.01	0.001538	217	98.8218
296.01	0.001538	216	98.3664
296.01	0.001538	215	97.911
296.01	0.001538	214	97.4556
296.01	0.001538	213	97.0002
296.01	0.001538	212	96.5448
296.01	0.001538	211	96.0894
296.01	0.001538	210	95.634
296.01	0.001538	209	95.1786
296.01	0.001538	208	94.7232
296.01	0.001538	207	94.2678
296.01	0.001538	206	93.8124
296.01	0.001538	205	93.357
296.01	0.001538	204	92.9016
296.01	0.001538	203	92.4462
296.01	0.001538	202	91.9908
296.01	0.001538	201	91.5354
296.01	0.001538	200	91.08
296.01	0.001538	199	90.6246
296.01	0.001538	198	90.1692
296.01	0.001538	197	89.7138
296.01	0.001538	196	89.2584
296.01	0.001538	195	88.803
296.01	0.001538	194	88.3476
296.01	0.001538	193	87.8922
296.01	0.001538	192	87.4368
296.01	0.001538	191	86.9814
319.03	0.001538	190	93.25492
0	0.001538	189	0
0	0.001538	188	0
448.02	0.001538	187	128.8919
448.02	0.001538	186	128.2026
448.02	0.001538	185	127.5134
448.02	0.001538	184	126.8241
448.02	0.001538	183	126.1349
361.38	0.001538	182	101.1864
296.01	0.001538	181	82.4274
296.01	0.001538	180	81.972
296.01	0.001538	179	81.5166
296.01	0.001538	178	81.0612
296.01	0.001538	177	80.6058
296.01	0.001538	176	80.1504
296.01	0.001538	175	79.695
296.01	0.001538	174	79.2396
296.01	0.001538	173	78.7842
296.01	0.001538	172	78.3288

$497.25 one week paid for 4/9/12 to 4/22/12

296.01	0.001538	170	77.418
296.01	0.001538	169	76.9626
296.01	0.001538	168	76.5072
296.01	0.001538	167	76.0518
296.01	0.001538	166	75.5964
296.01	0.001538	165	75.141
296.01	0.001538	164	74.6856
296.01	0.001538	163	74.2302
284.99	0.001538	162	71.02828
267.21	0.001538	161	66.18586
267.21	0.001538	160	65.77477
267.21	0.001538	159	65.36368
267.21	0.001538	158	64.95258
267.21	0.001538	157	64.54149
267.21	0.001538	156	64.1304
267.21	0.001538	155	63.71931
267.21	0.001538	154	63.30822
267.21	0.001538	153	62.89712
267.21	0.001538	152	62.48603
267.21	0.001538	151	62.07494
267.21	0.001538	150	61.66385
267.21	0.001538	149	61.25275
267.21	0.001538	148	60.84166
267.21	0.001538	147	60.43057
267.21	0.001538	146	60.01948
267.21	0.001538	145	59.60838
267.21	0.001538	144	59.19729
267.21	0.001538	143	58.7862
267.21	0.001538	142	58.37511
267.21	0.001538	141	57.96402
267.21	0.001538	140	57.55292
267.21	0.001538	139	57.14183
267.21	0.001538	138	56.73074
267.21	0.001538	137	56.31965
267.21	0.001538	136	55.90855
267.21	0.001538	135	55.49746
297.98	0.001538	134	61.42972
487	0.001538	133	99.64769
487	0.001538	132	98.89846
487	0.001538	131	98.14923
487	0.001538	130	97.4
487	0.001538	129	96.65077
487	0.001538	128	95.90154
487	0.001538	127	95.15231
487	0.001538	126	94.40308
487	0.001538	125	93.65385
487	0.001538	124	92.90462
487	0.001538	123	92.15538
487	0.001538	122	91.40615
487	0.001538	121	90.65692
487	0.001538	120	89.90769
487	0.001538	119	89.15846
487	0.001538	118	88.40923
487	0.001538	117	87.66
487	0.001538	116	86.91077
487	0.001538	115	86.16154
487	0.001538	114	85.41231
487	0.001538	113	84.66308

487	0.001538	110	82.41538
487	0.001538	109	81.66615
487	0.001538	108	80.91692
487	0.001538	107	80.16769
487	0.001538	106	79.41846
487	0.001538	105	78.66923
487	0.001538	104	77.92
487	0.001538	103	77.17077
487	0.001538	102	76.42154
487	0.001538	101	75.67231
487	0.001538	100	74.92308
487	0.001538	99	74.17385
487	0.001538	98	73.42462
487	0.001538	97	72.67538
487	0.001538	96	71.92615
487	0.001538	95	71.17692
487	0.001538	94	70.42769
487	0.001538	93	69.67846
487	0.001538	92	68.92923
424.17	0.001538	91	59.3838
280.01	0.001538	90	38.77062
280.01	0.001538	89	38.33983
280.01	0.001538	88	37.90905
280.01	0.001538	87	37.47826
280.01	0.001538	86	37.04748
280.01	0.001538	85	36.61669
280.01	0.001538	84	36.18591
280.01	0.001538	83	35.75512
280.01	0.001538	82	35.32434
280.01	0.001538	81	34.89355
280.01	0.001538	80	34.46277
280.01	0.001538	79	34.03198
487	0.001538	78	58.44
487	0.001538	77	57.69077
136.36	0.001538	76	15.94363
0	0.001538	75	0
0	0.001538	74	0
0	0.001538	73	0
0	0.001538	72	0
0	0.001538	71	0
0	0.001538	70	0
0	0.001538	69	0
0	0.001538	68	0
0	0.001538	67	0
0	0.001538	66	0
0	0.001538	65	0
0	0.001538	64	0
0	0.001538	63	0
0	0.001538	62	0
0	0.001538	61	0
0	0.001538	60	0
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92956 46

30104 76

123061 2

ADDENDUM
NO. 6

LAW OFFICES
PLANT, CHRISTENSEN & KANELL
PROFESSIONAL CORPORATION
ESTABLISHED 1856
&
STEWART & STEWART
136 EAST SOUTH TEMPLE SUITE 700
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THEODORE E KANELL

December 6 2005

L Dawn Atkin
Atkin & Associates
1111 Bridgeyard Road Suite 200
Salt Lake City UT 84106

Re	Zachery Clausing v Frito Lay
Claim No	21954082
DOL	03 18 1999
Our File No	01-215

Dear Dawn

This letter will serve to respond to your letter and fax of December 1 2005 in which you outlined what you felt was your client's claim for temporary total and temporary partial disability payments You indicated that according to your calculations $92,956 46 was owed in compensation benefits, with another $30,104 76 owed in interest for a total of $123 061 20

After reviewing your calculations and the prior orders in this case I feel that your calculations are in error As you are aware, your client originally filed a claim on February 9, 2001, in which she claimed entitlement to medical expenses and temporary total compensation as the result of knee injuries with two knee surgeries as the result of the industrial incident on March 18, 1999 Your client was represented by Tim Allen in this first proceeding On October 11, 2001 Mr Allen, at your client's direction amended that application for hearing to include the low back injury and to claim entitlement to recommended medical care and permanent impairment

Accordingly at the time of hearing on January 14 2002, your client's claims included low back and knee injuries as the result of the industrial incident on March 18, 1999 and your client was claiming entitlement to medical expenses recommended medical care, temporary total compensation and permanent impairment Prior to the hearing $5 162 00 had been paid to your client for temporary compensation benefits As you are aware at hearing on January 14, 2002 your client stipulated to a settlement which was memorialized in an order entered by Judge Sharon Eblen on October 22, 2002 Our settlement agreement on this date resolved all issues pending at the hearing on January 14 2002, which included your client s claim for temporary compensation related to her knee and low back injuries By agreeing to settle her

claim at hearing, your client waived any further claim for additional temporary compensation relating to her knee and low back, absent a change in condition

The only change with respect to your client's condition as related to the low back and knee issues would be the third knee surgery which occurred on April 9, 2002, which was a palliative hardware removal. Your client received $974.00 in temporary total compensation for the period from the date of surgery on April 9, 2002 to April 22, 2002 Page 167 of the Medical Record Exhibit indicates that your client was released to work as of April 18, 2002, without restrictions to her hours. Accordingly, based on my review of the orders, medical records, and your computations, there is no outstanding compensation to be paid, as your client's neck condition has been found to be non-industrial.

If you have any questions, please give me a call.

Very truly yours,

PLANT, CHRISTENSEN & KANELL

THEODORE E KANELL
ANDREW M. WADSWORTH

AMW/mjw

MAILING CERTIFICATE

I HEREBY CERTIFY that, on the 10th day of April, 2007, two true and correct copies of the foregoing and within Employee's Brief were deposited with the United States mails, first class postage prepaid, and duly addressed for delivery to the following:

Theodore E. Kanell, Esq.
John H. Romney, Esq.
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